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*Counsel to the Circuit City Stores, Inc.
Liquidating Trust*

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

-----	x	
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC., <u>et al.</u> ,	:	Case No. 08-35653 (KRH)
	:	
Debtors.	:	
-----	:	Jointly Administered
	x	

LIQUIDATING TRUST'S OBJECTION TO CLAIM NO. 1723
FILED BY PNY TECHNOLOGIES, INC.

The Circuit City Stores, Inc. Liquidating Trust (the "Liquidating Trust"), through
Alfred H. Siegel, the duly appointed trustee of the Trust (the "Trustee"), pursuant to the
Second Amended Joint Plan of Liquidating of Circuit City Stores, Inc. and its Affiliated

Debtors and Debtors in Possession and its Official Committee of Creditors Holding General Unsecured Claims (the “Plan”) in the above-captioned cases, hereby files this objection (the “Objection”) to Claim No. 1723 (the “Claim”) filed by PNY Technologies, Inc. (“PNY”), and hereby moves this court (the “Court”), pursuant to sections 105, 502 and 503 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the “Bankruptcy Code”), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Bankruptcy Rule 3007-1, for an order disallowing the Claim in its entirety. In support of the Objection, the Liquidating Trust states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Objection under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Objection in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are Bankruptcy Code sections 105, 502 and 503, Bankruptcy Rule 3007 and Local Bankruptcy Rule 3007-1.

GENERAL BACKGROUND

2. On November 10, 2008 (the “Petition Date”), the debtors in the above-captioned cases (the “Debtors”)¹ filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

3. On November 12, 2008, the Office of the United States Trustee for

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Proper ties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc.(6796), Sky Venture Corp. (0311), PRAHS, Inc.(n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, (cont'd)

the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the “Creditors’ Committee”).

4. On November 12, 2008, the Court appointed Kurtzman Carson Consultants LLC (“KCC”) as claims, noticing, and balloting agent for the Debtors in these chapter 11 cases pursuant to 28 U.S.C. § 156(c).

5. On December 10, 2008, the Court entered that certain Order Pursuant to Bankruptcy Code Sections 105 and 502 and Bankruptcy Rules 2002, 3003(c)(3), and 9007 (I) Setting General Bar Date and Procedures for Filing Proofs of Claim; and (II) Approving Form and Manner of Notice Thereof (Docket No. 890) (the “Claims Bar Date Order”).

6. Pursuant to the Claims Bar Date Order, the deadline for filing all “claims” (as defined in 11 U.S.C. § 105(5)) arising before November 10, 2008 against the Debtors by any non-governmental entity was 5:00 p.m. (Pacific) on January 30, 2009 (the “General Bar Date”). The deadline for governmental units to file claims that arose before November 10, 2009 was 5:00 p.m. (Pacific) on May 11, 2009 (the “Governmental Bar Date”). Pursuant to the Claims Bar Date Order, this Court approved the form and manner of the claims bar date notice, which was attached as Exhibit A to the Claims Bar Date Order (the “Claims Bar Date Notice”).

7. On December 17 and 19, 2008, KCC served a copy of the Claims Bar Date Notice on all parties who filed notices of appearance pursuant to Bankruptcy

(cont'd from previous page)

LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512).

Rule 2002, all of the Debtors' scheduled creditors in these cases, the Debtors' equity holders, and certain other parties (Docket No. 1314). In addition, the Debtors published the Claims Bar Date Notice in The Wall Street Journal (Docket No. 1395) and The Richmond Times-Dispatch (Docket No. 1394).

8. On January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement") between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores. As of March 8, 2009, the going out of business sales at the Debtors' remaining stores had been completed.

9. On August 9, 2010, the Debtors and the Creditors' Committee filed the Plan, which provides for the liquidation of the Debtors' assets and distribution of the proceeds thereof under chapter 11 of the Bankruptcy Code.

10. On September 10, 2010, the United States Bankruptcy Court, Eastern District of Virginia, signed an Order confirming the Plan.

11. The Plan became effective on November 1, 2010 (the "Effective Date"), and pursuant to the Plan and Liquidating Trust Agreement approved therewith, the Trust assumed the right and responsibility to liquidate the Debtors' remaining assets and distribute the proceeds to creditors, including entering into settlement agreement, the prosecution of Causes of Action and objections to claims.

BACKGROUND REGARDING RELATIONSHIP OF CIRCUIT CITY AND PNY

12. Prior to the commencement of the Debtors' bankruptcy cases, the

Debtors were a leading specialty retailer of consumer electronics and operated large nationwide electronics stores that sold, among other things, televisions, home theatre systems, computers, camcorders, furniture, software, imaging and telecommunications products, and other audio and video electronics.

13. While the parties had prior business dealings going back to at least 2001, on May 16, 2006, Circuit City and PNY entered into a “Master Dealer Agreement.” In addition, over the course of their relationship, Circuit City and PNY entered into numerous side agreements, addenda and letter agreements, both subject to, and outside of, the terms of the Master Dealer Agreement (collectively, the “PNY Agreements”), including that certain Product Addendum dated August 8, 2006 (the “Product Addendum”). Copies of the Master Dealer Agreement and Product Addendum are attached hereto as Exhibits B and C, respectively, and filed under seal.² Pursuant to the PNY Agreements, Circuit City purchased certain goods from PNY for resale by Circuit City through its retail channels.

14. Prior to the Petition Date, on October 27, 2008, PNY commenced an action against Circuit City, in the United States District Court for the District of New Jersey, Case No. 2:08-cv-05281 (the “Litigation”), seeking a judgment in excess of \$10,000,000 based upon the Debtor’s alleged breach of an agreement concerning Flash Cards (as defined in the underlying agreement referenced in the Litigation), breach of the implied covenant of good faith and fair dealing, promissory estoppel, negligent

² Due to a confidentiality provision in the Master Dealer Agreement, the Liquidating Trust is providing a copy of the Master Dealer Agreement and Product Addendum to PNY and is concurrently filing a motion with the Court to file the Master Dealer Agreement and Product Addendum under seal.

misrepresentation, unjust enrichment, fraud, failure to pay, book account, and account stated. The Litigation was stayed upon commencement of the Debtors' bankruptcy cases.

15. On December 16, 2008, PNY filed the Claim seeking payment of damages claimed in the Litigation. In addition, also in December of 2008, PNY filed claim number 447 ("Claim No. 447"), in the amount of \$1,723,312.08.

16. On March 23, 2010, the Debtors filed a complaint (the "Complaint") commencing an adversary proceeding against PNY (Adv. No. 10-3056) ("Adversary Proceeding"). In the Adversary Proceeding, the Debtors asserted that they were entitled to recover certain unpaid obligations and avoid and recover alleged preferential transfers made to PNY during the 90-day period prior to the Petition Date.

17. On or about February 8, 2011, PNY and the Liquidating Trust entered into a settlement agreement ("Settlement Agreement") concerning the Adversary Proceeding and Claim No. 447 whereby the parties agreed, among other things, to dismiss the Adversary Proceeding with prejudice as to all counts except for the Trustee's right to challenge the Claim. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit D. After the Settlement Agreement had been negotiated and signed, the Liquidating Trust filed a dismissal of the Adversary Proceeding (the "Rule 41 Dismissal"). A true and correct copy of the Rule 41 Dismissal is attached hereto as Exhibit E.

18. On October 21, 2011, the Liquidating Trust filed an objection to the Claim [Docket No. 11388] (the "Omnibus Objection"). PNY filed a response to the Omnibus Objection [Docket No. 11473] (the "Omnibus Response"), asserting that (i) the Settlement Agreement required any objection to be by way of an adversary proceeding and

(ii) the Settlement Agreement prohibited a books and records objection to the Claim. A true and correct copy of the Omnibus Response is attached hereto as Exhibit F. As the Liquidating Trust always intended to file a more thorough stand alone objection to the Claim, and included the Claim in the October, 2011 Omnibus Objection through a miscommunication, the Liquidating Trust withdrew the Omnibus Objection as it related to the Claim so that it could prepare a more extensive objection, given the amount asserted by PNY.

LIQUIDATING TRUST'S RIGHT TO OBJECT TO THE CLAIM

19. The Liquidating Trust is Not Required to Commence an Adversary Proceeding to Object to the Claim. PNY asserted in the Omnibus Response that “pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure, the express terms of the Rule 41 Dismissal, and the Terms of the Settlement Agreement incorporated by reference therein, require the Trustee to commence an adversary proceeding . . . to challenge PNY’s . . . Claim.” Omnibus Response at ¶14. This is a blatant misrepresentation of Bankruptcy Rule 7001, the Rule 41 Dismissal and the Settlement Agreement. Nothing in any of the foregoing requires that the Liquidating Trust’s objection be in the form of an adversary proceeding.

20. Rule 7001 lists the types of proceedings that are properly adversary proceedings. Notably, none of the ten specified proceedings are objections to proofs of claim. Indeed, such a requirement would contradict Rule 3007 of the Bankruptcy Rules, which specifically provides that an objection to a claim may be accomplished, as the term suggests, through an objection. While Rule 3007 provides that an objection may properly be included as part of an adversary proceeding, no rule requires that an objection be made

in an adversary proceeding.

21. Similarly, the Rule 41 Dismissal contains no requirement, much less a suggestion, that the Liquidating Trust would further object to the Claim by way of an adversary proceeding rather than an objection. In addition, the Rule 41 Dismissal is not controlling as to the terms of the Settlement Agreement, as the best evidence of the terms of the Settlement Agreement is the Settlement Agreement itself.

22. Finally, nothing in the Settlement Agreement requires that the Liquidating Trust bring an objection exclusively through an adversary proceeding. Indeed, the Settlement Agreement suggests the contrary providing: “**Claim No. 1723.** The Parties reserve all rights with respect to Claim No. 1723, including the Trust’s right to timely object to the claim and PNY’s right to prosecute the claim fully.” Settlement Agreement at ¶5. The “Trust’s right to timely object to the claim” clearly includes objecting to the Claim through an objection. While the Settlement Agreement suggests that the Liquidating Trust may object to the Claim in an adversary (“the Adversary Proceeding shall be dismissed with prejudice as to all counts EXCEPT the objections to Claim No 1723, which counts shall be dismissed without prejudice”), nothing in the Settlement Agreement dictates such an action as the exclusive means of objecting to the Claim. Settlement Agreement at ¶3.

23. The Settlement Agreement Does Not Prohibit This Objection. In response to the Liquidating Trust’s Omnibus Objection, which sought disallowance on a “books and records” basis, PNY asserted that such an objection is prohibited by the Settlement Agreement. To the contrary, the Settlement Agreement contains no such prohibition; in fact, it expressly “reserves all rights with respect to Claim No. 1723” with

no qualifiers whatsoever. Settlement Agreement at ¶5. It is worth noting that PNY does not cite a single line from the Settlement Agreement in support of its argument that the Settlement Agreement prohibits a books and records objection.

24. In making its argument, PNY relies on a sentence in the Rule 41 Dismissal, quoted above, that provides: “this requested dismissal is without prejudice to the Trustee’s rights, all of which are expressly reserved, to object to the validity and extent of PNY’s Claim No. 1723 . . . based solely on other grounds for objection.” Rule 41 Dismissal at 2. To the extent there is any ambiguity between the Settlement Agreement and the Rule 41 Dismissal, it is the Settlement Agreement that controls. The Rule 41 Dismissal drafted subsequent to and separately from the Settlement Agreement does not and cannot modify the terms of the Settlement Agreement.

25. Regardless, the “other grounds for objection” provided for in the Rule 41 Dismissal can only mean other grounds for objection than were asserted in the Complaint and Adversary Proceeding, a point conceded by PNY. As the only objection to the Claim in the Complaint and Adversary Proceeding was based on section 502(d) of the Bankruptcy Code, the Rule 41 Dismissal at most clarified that the Liquidating Trust retained all its rights to object to the Claim, other than those based on section 502(d), which objection could not be brought in light of the Settlement Agreement anyway as it would no longer exist. As the Complaint did not object to the Claim on any other ground than 502(d), PNY fully misrepresents the Complaint when it states, without citing to a specific paragraph: “The grounds for disallowance in the Adversary Proceeding centered on a ‘books and records’ general denial of liability.” Omnibus Response at ¶17.

26. Accordingly, objecting to the Claim through a claim objection on the bases set forth herein is appropriate.

OBJECTION TO THE CLAIM

27. The Claim Does Not Have *Prima Facie* Validity. When a claim is based upon a writing, Rule 3001(c) of the Bankruptcy Rules requires that the original writing or a duplicate be filed with the proof of claim. Bankruptcy Rule 3001(c); *In re Consolidated Pioneer Mortgage*, 178 B.R. 222, 225-26 (9th Cir. B.A.P. 1995). If the writing is not included, there shall be no *prima facie* presumption of validity of the claim. *In re Henry*, 311 B.R. 813, 817 (Bankr. W.D. Wash. 2004). *Id.*

28. Moreover, if an objection is made to the proof of claim, the creditor has the ultimate burden of persuasion as to the validity and amount of the claim.” *Official Comm. of Unsecured Creditors v. Fairchild Dornier GMBH (In re Dornier Aviation (N. Am.) Inc.)*, Adversary No. 02-8199-SSM, 2005 Bankr. LEXIS 561, 2005 WL 4781236, at * 11 (Bankr. E.D. Va. Feb. 8, 2005) (citing 11 U.S.C. § 502(a)-(b); Fed. R. Bankr. P. 3001(f); *C-4 Media Cable S., L.P. v. Reds T. V. & Cable, Inc. (In re C-4 Media Cable S., L.P.)*, 150 B.R. 374, 377 (Bankr. E.D. Va.1992)). *See also, In re Hold*, 931 F. 2d. 620, 623 (9th Cir. 1991); *In re Fidelity Mortgage Holding Company, Ltd.*, 837 F. 2d 696, 698 (5th Cir. 1988) (“the claimant must . . . ‘prove the validity of the claim by a preponderance of the evidence.’ The ultimate burden of proof always rests upon the claimant.”).

29. PNY thus bears the burden to present admissible evidence to prove the validity of the asserted Claim. As the Claim consists entirely of unsupported allegations, in the form of a state court complaint, PNY has failed to satisfy its burden to establish the validity of the Claim.

30. The Liquidating Trust Disputes Liability Entirely. There is no evidence in the books and records of the Debtors to support any the liability to PNY as asserted in the state court complaint (the “State Court Complaint”). Indeed, the relevant information in the Debtors’ records suggests that it was PNY that breached the Master Dealer Agreement for refusing to ship the required number of memory or video cards to the Debtors during the later stages of the Debtors’ existence.

31. On its Face, the Claim is Overstated. The Claim asserts liability of “at least \$10,000,000” based on the complaint that PNY filed against Circuit City in state court (the “State Court Complaint”). *Claim at 1.* Not only are these merely unproven allegations, but the State Court Complaint also only specifies damages of \$2,299,544 based upon book account and account stated. The balance of the Claim is based on mere allegations of additional damages and sums to be determined at trial based on lost profits, punitive damages and attorneys’ fees.

32. Nothing in the State Court Complaint or the Claim provides sufficient information for the Liquidating Trust to analyze the liability alleged. Indeed, even the \$2,299,544 figure demanded in the State Court Complaint is presented without any accounting of the amount demanded or other support to explain or establish the basis therefore.

33. The State Court Complaint Seeks Damages Unavailable to PNY By Virtue of the Parties’ Master Dealer Agreement. Reserving all its rights to fully object to allegations in the State Court Complaint and provide defenses thereto, the Liquidating Trust has preliminarily identified provisions in the PNY Agreements that would

substantially limit the Claim: (i) paragraph 5(e) of the Master Dealer Agreement provides that Circuit City shall not be liable to vendor for any loss of profits or revenue or for any incidental, special, consequential or punitive damages resulting from any performance, non-performance, breach or termination of the Master Dealer Agreement; and (ii) paragraph 7(c) provides for termination of the Agreement, without liability or further obligation, upon the filing of a bankruptcy petition. While the Product Addendum amended paragraph 7(a) and (b) of the Master Dealer Agreement, nothing modified paragraph 7(c) or (d). Finally, PNY's claim for relief based on Promissory Estoppel is inappropriate where there is a written contract that provides the promises between the parties and sets forth limitations on damages for breach of those promises.

RESERVATION OF RIGHTS

34. The Liquidating Trust reserves the right to modify, supplement and/or amend this Objection upon the receipt of additional information..

WAIVER OF MEMORANDUM OF LAW

35. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Motion, the Liquidating Trust requests that the requirement that all motions be accompanied by a written memorandum of law be waived.

NO PRIOR RELIEF

36. No previous request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Liquidating Trust respectfully requests that the Court enter an Order in the form attached hereto as Exhibit A sustaining this Objection and

disallowing the Claim, and granting such other and further relief as the Court deems appropriate.

Dated: Richmond, Virginia
April 24, 2012

TAVENNER & BERAN, PLC

/s/ Lynn L. Tavenner
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*Counsel to the Circuit City Stores, Inc.
Liquidating Trust*

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing proposed Objection of the Circuit City Stores, Inc. Liquidating Trust to Claim No. 1723 Filed By PNY Technologies, Inc. to be served in accordance with the Case Management Order and via first-class mail, postage prepaid, to the following:

PNY Technologies, Inc.
c/o Registered Agent
The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

Gadi Cohen
Chairman of the Board, CEO and President
PNY Technologies, Inc.
299 Webro Road
Parsippany, NJ 07054-0218

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/s/ Lynn L. Tavenner

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EXHIBIT A

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Counsel to the Liquidating Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

-----	x	
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC., <u>et al.</u> ,	:	Case No. 08-35653 (KRH)
	:	
Debtors.	:	
-----	:	Jointly Administered
	x	

**ORDER SUSTAINING LIQUIDATING TRUST'S OBJECTION TO
CLAIM NO. 1723 FILED BY PNY TECHNOLOGIES, INC.**

THIS MATTER having come before the Court³ on the *Liquidating Trust's*

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

Objection to Claim No. 1723 Filed by PNY Technologies, Inc. (the “Objection”), which asks that Claim No. 1723 (the “Claim”) be disallowed for the reasons set forth in the Objection; and it appearing that due and proper notice and service of the Objection as set forth therein was good and sufficient, and that no other further notice or service of the Objection need be given; and it appearing that the relief requested in the Objection is in the best interest of the Liquidating Trust, the Debtors’ estates and creditors and other parties-in-interest; and after due deliberation thereon good and sufficient cause exists for the granting of the relief as set forth herein,

IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT:

1. The Objection is SUSTAINED.
2. The Claim is forever disallowed in its entirety for all purposes in these bankruptcy cases.
3. The Liquidating Trust shall serve a copy of this Order on the claimant PNY Technologies, Inc. on or before five (5) business days from the entry of this Order.
4. This Court shall retain jurisdiction to hear and determine all matters arising from or relating to this Order.

Dated: Richmond, Virginia
_____, 2012

HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

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(212) 561-7700

*Counsel to the Circuit City Stores, Inc.
Liquidating Trust*

CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)

Pursuant to Local Bankruptcy Rule 9022-1(C), I hereby certify that the foregoing proposed order has been endorsed by or served upon all necessary parties.

/s/ Lynn L. Tavenner
Lynn L. Tavenner

EXHIBIT B (filed under seal)

EXHIBIT C (filed under seal)

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Counsel to the Circuit City Stores, Inc.
Liquidating Trust

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

-----	X	
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC., <u>et al.</u> ,	:	Case No. 08-35653 (KRH)
	:	
Debtors.	:	
-----	:	Jointly Administered
	X	

**SETTLEMENT AGREEMENT AND STIPULATION BY AND AMONG THE
CIRCUIT CITY STORES, INC. LIQUIDATING TRUST AND
PNY TECHNOLOGIES, INC.**

This settlement agreement and stipulation (this "Agreement") is entered into by and among the Circuit City Stores, Inc. Liquidating Trust (the "Trust"), on the one hand, and PNY Technologies, Inc. ("PNY"), on the other hand ("PNY" and the "Trust" may be referenced herein as the "Parties", and/or each as a "Party").



GENERAL BACKGROUND

WHEREAS, on November 10, 2008 (the "Petition Date"), the Debtors in the above-captioned captioned cases (the "Debtors")¹ each filed a voluntary petition in the United States Bankruptcy Court for the Eastern District of Virginia (the "Court") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"); and

WHEREAS, on November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"); and

WHEREAS, on January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement") between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores. On or about March 8, 2009, the going out of business sales concluded; and

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, INC. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512).

WHEREAS, on September 29, 2009, the Debtors and the Creditors Committee filed the First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors In Possession and its Official Committee of Creditors Holding General Unsecured Claims (the "First Amended Plan"). The associated disclosure statement (the "Disclosure Statement") was approved on September 24, 2009. Confirmation of the First Amended Plan was originally scheduled for November 23, 2009, but was adjourned from time to time; and

WHEREAS, on August 9, 2010, the Debtors and the Creditors' Committee filed the Second Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors In Possession and its Official Committee of Creditors Holding General Unsecured Claims (the "Plan"), and the Plan was confirmed on September 10, 2010; and

WHEREAS, the Plan became effective on November 1, 2010, and pursuant to the Plan and Liquidating Trust Agreement approved therewith, the Trust assumed the right and responsibility to liquidate the Debtors' remaining assets and distribute the proceeds to creditors; and

WHEREAS, the Trust is authorized under the Plan and Liquidating Trust Agreement to settle claims and causes of action, subject to the notice provisions therein.

SETTLEMENT BACKGROUND

WHEREAS, the Debtors and PNY had various business relationships prior to the filing of the Petition Date, relating to the Debtors' operation of Circuit City retail stores;

WHEREAS, on or about December 1, 2008, PNY filed claim number 447 ("Claim No. 447") in the total amount of \$1,723,312.08, asserting 503(b)(9) priority as to a portion of the claim, and as a general unsecured, non-priority entitlement as to the balance; and

WHEREAS following objection by the Debtors, the Court approved a stipulation of the Parties that the entirety of Claim No. 447 was, if valid, entitled to general unsecured non-priority status; and

WHEREAS, on or about December 16, 2008, PNY filed claim number 1723 ("Claim No. 1723") as a general unsecured, non-priority claim in an unliquidated amount, arising from prepetition litigation commenced in the District Court of New Jersey, which litigation was stayed by the filing of the Debtors' Cases; and

WHEREAS, on or about August 20, 2009, the Debtors filed their 31st Omnibus Claims Objection, which included an Objection to Claim No. 1723. The Debtors' Objection to Claim No. 1723 was continued from time to time; and

WHEREAS, on March 23, 2010, the Debtors filed a complaint initiating an adversary proceeding against PNY, No. 10-3056 (the "Adversary Proceeding"), pursuant to which the Debtors asserted that they are entitled to recover

certain Unpaid Obligations (as defined in the Complaint) and, pursuant to Bankruptcy Code sections 547 and 550, avoid and recover alleged preferential transfers made during the 90-day period prior to the Petition Date, and which incorporated and superceded the Debtors' Objections to Claim Nos. 447 and 1723; and

WHEREAS, rather than proceed with litigation concerning Claim Nos. 447 and 1723 and the Adversary Proceeding, the Parties engaged in good faith, arms' length negotiations to resolve the foregoing in their entirety; and

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby STIPULATE AND AGREE that:

1. The above recital clauses are incorporated by reference in this Stipulation as if fully set forth herein.
2. **Claim No. 447.** Claim No. 447 shall be reduced to the amount of \$538,000, and shall be allowed as a general unsecured non-priority claim in the amount of \$538,000. The balance of Claim No. 447 as originally asserted shall be disallowed in its entirety.
3. **Adversary Proceeding.** On the Effective Date, as defined in paragraph 16 below, the Adversary Proceeding shall be dismissed with prejudice as to all counts EXCEPT the objections to Claim No. 1723, which counts shall be dismissed without prejudice. To the extent the Debtors' 31st Omnibus Objection to

Claim No. 1723 remains active or pending on the Court's docket, the Trust shall modify or withdraw its Claims Objection to Claim No. 1723, subject to the Trust's right to renew its Objection in accordance with paragraph 5 below. The Parties shall take all necessary steps and file all necessary pleadings with the Court to timely dismiss the Adversary Proceeding and that portion of the 31st Omnibus Claims Objection in accordance with this Agreement.

4. **Contracts.** Any and all contracts by and between the Parties, including but not limited to the Contract, not previously terminated or rejected, shall be deemed rejected as of the Effective Date.

5. **Claim No. 1723.** The Parties reserve all rights with respect to Claim No. 1723, including the Trust's right to timely object to the claim and PNY's right to prosecute the claim fully.

6. **Resolution of Claims and Disputes.** The Parties are entering into this Settlement Agreement to resolve all matters of dispute or potential dispute arising out of claims related to or asserted in, or which could have been asserted in the Adversary Proceeding and Claim No. 447, and any other claims by and between the Parties, whether or not such claims are known or unknown to the Parties, and whether or not such claims have been asserted by the Parties, EXCEPT those claims asserted by PNY in Claim No. 1723, and any unasserted claims that, as a matter of law, would relate back to the complaint that underlies Claim No. 1723. Any and all other claims against the Trust, the Debtors and/or their estates, collectively or individually, by or on behalf of PNY, expressly including any claim that PNY might

be entitled to file under Bankruptcy Code section 502(h), are hereby irrevocably withdrawn, disallowed, and expunged in their entirety except as stated herein. Any and all other claims against PNY, collectively or individually, by or on behalf of the Trust, or the Debtors and their estates are hereby irrevocably withdrawn, released, and expunged in their entirety except as stated herein.

7. **Trust's Release.** As of the Effective Date, the Trust, without the need for additional documentation or the entry of any additional orders, except as expressly provided in this Settlement Agreement, on behalf of itself, the Debtors and their bankruptcy estates, together with each of their affiliates, parents, agents, subsidiaries, and the successors and assigns of any of them, and any other person or entity that claims or might claim through, on behalf of or for the benefit of any of the foregoing (collectively, the "Trust Releaser"), shall be deemed to have irrevocably and unconditionally, fully, finally and forever waived, released, acquitted and discharged PNY, its past or present affiliates, attorneys, directors, employees, officers, parents, agents, subsidiaries, and the successors and assigns of any of them (the "PNY Releasees"), from any and all manner of actions, causes of action, suits, costs, debts, liabilities, obligations, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, of whatever kind or nature, whether known or unknown, suspected or unsuspected, in law or equity, which the Trust Releaser or the Debtors, from the beginning of time through the Effective Date, have, have had, may have or may

claim to have against any PNY Releasees, including, without limitation, any and all claims asserted in or which could have been asserted in, or which relate to the subject matter of the Adversary Proceeding and Claim No. 447, as well as any and all claims that may have arisen or may relate to any other events, activities, or occurrences that have taken place or take place on or before the Effective Date (collectively, the "Trust's Released Claims"). The Parties intend that this release shall be a general release, subject only to any exclusions set forth herein, and the inclusion of the foregoing specifically included released matters shall not be construed as detracting from the purposefully general nature of this release.

8. **PNY's Release.** Effective on the Effective Date, PNY, without the need for additional documentation or the entry of any additional orders, except as expressly provided in this Settlement Agreement, on behalf of itself and each of its affiliates, parents, agents, subsidiaries, and the successors and assigns of any of them, and any other person or entity that claims or might claim through, on behalf of or for the benefit of any of the foregoing (collectively, the "PNY Releasers"), shall be deemed to have irrevocably and unconditionally, fully, finally and forever waived, released, acquitted and discharged the Trust, the Debtors, their past or present affiliates, attorneys, directors, employees, officers, parents, agents subsidiaries, and the successors and assigns of any of them (collectively, the "Trust Releasees"), from any and all manner of actions, causes of action, suits, costs, debts, liabilities, obligations, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses,

damages, judgments, executions, claims and demands whatsoever, of whatever kind or nature, whether known or unknown, suspected or unsuspected, in law or equity, which the PNY Releasors, or any of them, from the beginning of time through the Effective Date, have, have had, may have or may claim to have against any of the Trust Releasees, including, without limitation, any and all claims asserted in or which could have been asserted in, or which relate to the subject matter of the Adversary Proceeding and Claim No. 447, except for PNY's claims or causes of action related to Claim No. 1723, including any claim that PNY might be entitled to filed under Bankruptcy Code section 502(h), as well as any and all claims that may have arisen or may relate to any other events, activities, or occurrences that have taken place or take place on or before the Effective Date (collectively, the "PNY Released Claims"). The Parties intend that this release shall be a general release, subject only to any exclusions set forth herein, and the inclusion of the foregoing specifically included released matters shall not be construed as detracting from the purposefully general nature of this release.

9. As to the mutual releases contained herein, the Trust Releasor and PNY Releasors hereby expressly waive and relinquish, to the fullest extent permitted by law, the benefits of California Civil Code section 1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

or any similar law in any other jurisdiction.

10. **No Admissions.** This Settlement Agreement is not and shall not in any way be construed as an admission by the Parties of any allegations asserted in the Adversary Proceeding, Claim No. 447 or Claim No. 1723.

11. **Expenses.** The Parties shall bear their own costs, expenses and attorneys' fees incurred in connection with the Trust Released Claims, the PNY Released Claims, the Adversary Proceeding, and this Settlement Agreement. In the event of any dispute in connection with the enforcement of this Settlement Agreement, the prevailing Party shall be entitled to its reasonable attorneys' fees, costs and all necessary disbursements and out-of-pocket expenses, whether statutorily approved or non-approved costs, incurred in connection with such action or proceeding, as determined by this Court.

12. **No Other Obligations.** The Parties agree that the Parties have no obligation to one another other than as set forth herein.

13. **Severability.** The Parties agree that if any provision of this Settlement Agreement is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable, that provision shall not be a part of this Settlement Agreement. The legality, validity and enforceability of the remaining provisions shall not be affected by a provision of this Settlement Agreement that is illegal, invalid or unenforceable.

14. **Confidentiality.** This Settlement Agreement is confidential and neither the Settlement Agreement nor the terms of the Settlement Agreement shall be

disclosed to any person, except for (a) the Parties and/or (b) any attorneys, professionals, and/or agents of the Parties, without the consent and agreement in writing of the Parties. Notwithstanding the foregoing, it shall not be considered a breach of this paragraph for a Party to disclose the terms hereof to local, state, and federal tax authorities, the Parties' auditors or accountants, or to make such disclosure to any other persons or entities when legally compelled to do so or in connection with litigation arising from or related hereto.

15. Miscellaneous.

(a) Nothing contained herein shall be deemed an admission of liability on the part of the Trust or PNY.

(b) Neither this Settlement Agreement, nor any statement made or action taken in connection with the negotiation of this Settlement Agreement, shall be offered or received in evidence or in any way referred to in any legal action or administrative proceeding among or between the parties hereto, other than as may be necessary (i) to obtain approval of and to enforce this Settlement Agreement (including the mutual releases contained herein) or (ii) to seek damages or injunctive relief in connection therewith.

(c) Each of the parties hereto shall execute and deliver any and all additional papers, documents and other assurances, and shall do any and all acts and things reasonably necessary or appropriate in conjunction with the performance of their respective obligations hereunder.

(d) No provision of this Settlement Agreement is intended to confer any rights, benefits, remedies, obligations or liabilities hereunder upon any person other than the Parties hereto and their respective successors.

(e) This Settlement Agreement shall be governed by and construed in accordance with the law of the Commonwealth of Virginia without regard to any choice of law provisions.

(f) This Settlement Agreement may be signed in counterpart originals and delivered by facsimile or email, which, when fully executed, shall constitute a single original.

(g) The United States Bankruptcy Court for the Eastern District of Virginia shall retain exclusive jurisdiction (and the parties consent to such retention of jurisdiction) with respect to any disputes arising from or related to, or other actions to interpret, administer or enforce the terms and provisions of, this Settlement Agreement.

(h) Each person or entity who executes this Settlement Agreement on behalf of another person or entity represents and warrants that he, she, or it is duly authorized to execute this Settlement Agreement on behalf of such person or entity, has the requisite authority to bind such person or entity, and such person or entity has full knowledge of and has consented to this Settlement Agreement. The representations and warranties set forth in this paragraph shall survive execution of this Settlement Agreement.

(i) This Settlement Agreement is effective upon the Effective Date (as defined below).

(j) This Settlement Agreement shall not be modified, altered, amended or vacated without the written consent of all parties hereto or order of the Bankruptcy Court.

(k) This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto, including any Chapter 7 trustee or the Liquidating Trustee under the Plan.

16. The "Effective Date" of this Agreement and all of its terms shall be the later of (i) execution by all Parties and (ii) the expiration of the applicable Notice Period, if any, under the Liquidating Trust Agreement.

IN WITNESS WHEREOF, this Agreement is hereby executed as of February

3, 2011.

ACCEPTED AND AGREED TO BY:

THE CIRCUIT CITY STORES, INC.
LIQUIDATING TRUST

By: *Paula S. Beran*

TAVENNER & BERAN, PLC
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Paula S. Beran (VA Bar No. 34679)
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Counsel to the Circuit City
Stores, Inc. Liquidating Trust

Dated: January 31, 2011

PNY TECHNOLOGIES, INC.

By: *Michael J. H.*

Its *Treasurer*

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Andrew W. Caine, Esq.
(admitted *pro hac vice*)
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Counsel to the Liquidating Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

In re:) Case No. 08-35653 (KRH)
)
CIRCUIT CITY STORES, INC., <u>et al.</u> ,) Chapter 11
)
Debtors.) (Jointly Administered)
)
ALFRED H. SIEGEL, AS TRUSTEE OF THE)
CIRCUIT CITY STORES, INC. LIQUIDATING) Adv. Pro. No. 10-03056
TRUST,)
)
Plaintiff,)
)
v.)
)
PNY TECHNOLOGIES, INC.,)
Defendant.)
)

STIPULATION OF VOLUNTARY DISMISSAL

Comes now Alfred H. Siegel, the duly appointed trustee of the Circuit City Stores, Inc. Liquidating Trust (the "Trustee"), pursuant to the Second Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors in Possession and its

Official Committee of Creditors Holding General Unsecured Claims (the "Plan"), by counsel, and pursuant to Bankruptcy Procedure Rule 7041 and Federal Rule of Civil Procedure 41, moves to dismiss with prejudice the complaint against PNY Technologies, Inc. ("PNY"). As a point of clarification, and as memorialized in the parties' settlement agreement, this requested dismissal is without prejudice to the Trustee's rights, all of which are expressly reserved, to object to the validity and extent of PNY's Claim No. 1723, which claim is addressed in the complaint (as the Litigation Claim) in this adversary proceeding based solely on other grounds for objection. As evidenced by the endorsement herein, PNY consents to the dismissal provided for herein.

Dated: Richmond, Virginia
Feb. 14, 2011

TAVENNER & BERAN, PLC

/s/ Paula S. Beran

Lynn L. Tavenner (VA Bar No. 30083)
Paula S. Beran (VA Bar No. 34679)
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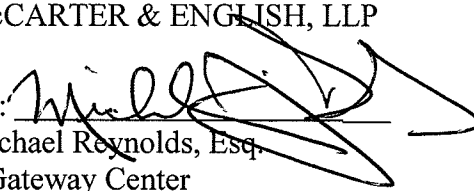
- and -

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Counsel to Plaintiff
Alfred H. Siegel, Trustee of the Circuit City Stores,
Inc. Liquidating Trust

Seen and Agreed:

McCARTER & ENGLISH, LLP

By: 
Michael Reynolds, Esq.

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EXHIBIT F

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Attorneys for PNY Technologies, Inc.

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

	:	
In re:	:	Case No. 08-35653 (KRH)
	:	
	:	Chapter 11
CIRCUIT CITY STORES, INC., <u>et al.</u> ,	:	
	:	
Debtors.	:	Jointly Administered
	:	
	:	

**CLAIMANT PNY TECHNOLOGIES, INC.'S RESPONSE TO LIQUIDATING
TRUSTEE'S TWENTY-THIRD OMNIBUS OBJECTION TO CLAIMS
(DISALLOWANCE OF CERTAIN INVALID UNLIQUIDATED CLAIMS)
[Document No. 11388]**

PRELIMINARY STATEMENT

Claimant PNY Technologies, Inc. ("PNY"), by and through its undersigned counsel, hereby responds to the Liquidating Trustee's (hereinafter, the "Trustee"), Twenty-Third Omnibus Objection to Claims (Disallowance of Certain Invalid Unliquidated Claims) (the

“Objection”). PNY’s “litigation claim” results from Circuit City’s failure to honor promises it made to induce PNY to pay Circuit City millions of dollars and make other costly concessions in connection with marketing of “flash memory” cards. PNY first asserted the claim in an action in the District of New Jersey commenced prior to the commencement of the Circuit City Chapter 11 proceedings.

As a threshold matter, PNY respectfully asserts that its litigation claim (Claim No. 1723) must be adjudicated of an adversary proceeding rather than merely lodging a “books and records” objection to the claim as asserted by the Trustee resulting in a contested matter. The “books and records” objection is in any event insufficient in general and precluded by prior proceedings in the case.

As explained below, this is the third objection filed by the Debtors and/or the Trustee relating to PNY’s litigation claim. The Debtors first attempt to disallow PNY’s litigation claim came before the Court by way of the Debtors’ Thirty-First Claims Objection. The Debtors objected to, and disclaimed any liability for PNY’s claim based on a bald “books and records” objection. The Debtors’ objection to PNY’s litigation claims was subsequently consolidated into an adversary proceeding styled, Circuit City Stores Inc. v. PNY Technologies, Inc., Case No. 10-3056. In that adversary proceeding, the Debtors again alleged no liability for PNY’s claim based on a “books and records” review.

In February 2011, PNY and the Trustee entered into a binding settlement agreement (“Settlement Agreement”) in the adversary proceeding. Among other things, the settlement preserved the Trustee’s right to later challenge PNY’s litigation claim, “on some other ground” other than a “books and records” objection, and, in the event of such a challenge, PNY preserved its right to prove up the extent and validity of its claim on the merits.

The Trustee's instant Objection is nothing more than an attempt to selectively dishonor the material provisions of the bargained for agreement memorialized in the Settlement Agreement. PNY respectfully submits that, in accordance with the terms of the Settlement Agreement, in order to disallow its litigation claim the Trustee must come forward with some defense to the allegations supporting PNY's claim. The assertion of a "books and records" objection to the claim is simply insufficient grounds for disallowance. This Court is bound to follow the plain language of the Settlement Agreement and enforce its provisions.

As stated below, PNY respectfully requests that this Court overrule the Trustee's "books and records" objection to PNY's litigation claim, and direct the Trustee to commence an adversary proceeding if he intends to challenge the extent or validity of the litigation claim. Otherwise, the Court should allow Claim 1723 in accordance with 11 U.S.C. § 502(a) and Rule 3001(f) of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

1. PNY commenced an action on October 27, 2008, against the Debtor, in the United States District Court for the District of New Jersey ("District Court"), Case No. 2:08-cv-05281 (the "Litigation"), seeking a judgment against Circuit City Stores, Inc. (the "Debtor"), in excess of \$10,000,000 based upon the Debtor's breach of an agreement concerning Flash Cards (computer memory small "card" devices for insertion into computer devices) that was entered into by PNY and the Debtor in or about August 2006. In addition to breach of contract, there are additional counts against the Debtor for breach of the implied covenant of good faith and fair dealing, promissory estoppel, negligent misrepresentation, unjust enrichment, fraud, failure to

pay, book account, and account stated (the "Complaint"). A true and correct copy of PNY's Complaint is attached hereto and incorporated herein as Exhibit A.

2. On October 30, 2008, the Debtor was served with the Summons and Complaint. A true and correct copy of the Proof of Service is attached hereto and incorporated herein as Exhibit B.

3. On November 10, 2008, the Debtor filed a petition under Chapter 11 of the United States Code (the "Petition Date").

4. On November 14, 2008, the Debtor filed its Suggestion of Bankruptcy in the District Court advising the Court that its bankruptcy case had been filed. A true and correct copy of the Debtor's Suggestion of Bankruptcy is attached hereto and incorporated herein as Exhibit C. On November 21, 2008, the District Court entered an Order administratively terminating the Litigation and staying the action based on the Debtor's filing of its voluntary petition. A true and correct copy of the District Court's Order is attached hereto and incorporated herein as Exhibit D.

5. On December 16, 2008, PNY timely filed a Proof of Claim form seeking payment of a \$10,000,000 unsecured claim relating to the damages claimed in the Litigation. (the "Litigation Claim") (Claim No. 1723). PNY attached the Complaint to the Proof of Claim. It is acknowledged that PNY's claim is presently unliquidated. A true and correct copy of PNY's Proof of Claim is attached hereto and incorporated herein as Exhibit E.

6. On August 20, 2008, the Debtors' filed their Thirty-First Omnibus Claims Objection, which included an objection to the Litigation Claim (Docket No. 4585). The Debtors classified the Litigation Claim as a "Legal Claim" that the Debtors sought to disallow and expunge based solely on their review of "the Legal Claims and the bases upon which they are

asserted and ...the Debtors' books and records" Based solely on that cursory review and without any further explanation, the Debtors baldly asserted that they disclaimed "any liability for the alleged Legal Claims." PNY filed a response to the Debtors' Objection to the Litigation Claim. Subsequently, the Debtors' Objection to the Litigation Claim was continued from time to time by this Court.

7. On March 23, 2010, the Debtors filed a complaint commencing an adversary proceeding against PNY (Adv. No. 10-3056) ("Adversary Proceeding"). In the Adversary Proceeding the Debtors asserted that they were entitled to recover certain unpaid obligations and avoid and recover alleged preferential transfers made to PNY during the 90-day period prior to the Petition Date. The Complaint in the Adversary Proceeding incorporated and included the Debtors' Objection to PNY's Litigation Claim. See Complaint, Adv. No. 10-3056.

8. On September 10, 2010, this Court entered an Order confirming the Debtors' Second Amended Joint Plan of Liquidation ("Confirmation Order"). (Docket No. 8555). The Plan became effective on November 1, 2010, and pursuant to the Plan and the Liquidating Trust Agreement approved therewith, The Liquidation Trust assumed the right and responsibility to liquidate the Debtors' remaining assets and distribute the proceeds to creditors.

9. Subject to certain notice provisions, Article 11.4.D. of the Liquidating Trust Agreement approved by this Court in conjunction with the Plan authorizes the Trustee to settle claims and causes of action such as the PNY Adversary Proceeding without seeking formal approval of this Court under Rule 9019 of the Federal Rules of Bankruptcy Procedure.

10. On or about February 8, 2011, PNY and the Trustee entered into a settlement agreement ("Settlement Agreement") concerning the Adversary Proceeding whereby the parties agreed, among other things, to dismiss the Adversary Proceeding with prejudice as to all counts

except for the Trustee's right to challenge PNY's Litigation Claim. A true and correct copy of the Settlement Agreement is attached hereto and incorporated herein as Exhibit F.

11. Through the Settlement Agreement, the parties further stipulated and agreed that they were reserving all rights with respect to the Litigation Claim, including PNY's right to prosecute the claim fully. Id. at ¶¶ 3, 5. The parties also entered into and exchanged general releases (the "Releases"), whereby all matters of dispute or potential dispute arising out of claims related to, or asserted in, or which could have been asserted in the Adversary Proceeding, whether known or unknown, were irrevocably withdrawn, released and expunged in their entirety, except for those claims asserted by PNY in its Litigation Claim, and any unasserted claims that, as a matter of law, would relate back to the underlying Complaint filed in the District Court action. Id. at ¶ 7, 8.

12. On or about February 14, 2011, the Trust filed its Stipulation of Voluntary Dismissal in the Adversary Proceeding ("Rule 41 Dismissal"). (Docket No. 33). The Rule 41 Dismissal states in relevant part: "As a point of clarification, and as memorialized in the parties' settlement agreement, this requested dismissal is without prejudice to the Trustee's rights, all of which are expressly reserved, to object to the validity and extent of PNY's Claim No. 1723, which claim is addressed in the complaint (as the Litigation Claim) in this adversary proceeding based solely on other grounds for objection." (emphasis added). A true and correct copy of the Rule 41 Dismissal is attached hereto and incorporated herein as Exhibit G.

13. On October 21, 2011, the Trustee filed the instant Objection. Through the Objection, the Trustee re-asserts that PNY's Litigation Claim should be disallowed, because, according to the Trustee, the Litigation Claim asserts claims "for which the Debtors do not have liability." See Objection as ¶ 23. The Trustee's basis of his general denial of liability arising

from the Litigation Claim is again based on his review of the Litigation Claim and his review of the Debtors' books and records. Id. at ¶ 24. These are same grounds the Debtor raised when they filed their original Objection to PNY's Litigation Claim in August 2008, and the same grounds for disallowance that were merely repeated in the Complaint in the Adversary Proceeding. The Trustee offers no other or further basis or grounds for his Objection to PNY's Litigation Claim.

14. As stated below, The Court must overrule the Trustee's Objection to PNY's Litigation Claim. The Trustee's latest attempt to disallow the Litigation Claim, without the benefit of a trial on the merits, violates the express terms of the Settlement Agreement entered into by the parties in February 2011. Moreover, PNY submits that, pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure, the express terms of the Rule 41 Dismissal, and the terms of the Settlement Agreement incorporated by reference therein, require the Trustee to commence an adversary proceeding should he wish to challenge PNY's Litigation Claim, and not by way of an Omnibus Claims Objection.

ARGUMENT

15. It is established bankruptcy law that a settlement agreement entered into by a debtor, or a trustee, and a creditor, compromising a claim or cause of action asserted in a bankruptcy case or an adversary proceeding is an enforceable contract, binding upon all of the parties to the agreement. See In re Frye, 216 B.R. 166, 170-71 (Bankr. E.D. Va. 1997). In Frye, the court held that a settlement agreement once entered into by the parties is binding on all parties pending approval by the court. Frye, 216 B.R. at 173-74.¹

¹ Based on the express terms of the Liquidating Trust Agreement approved by this Court in conjunction with the confirmed Plan of Liquidation, this Court's approval was not necessary to approve or effectuate the settlement

16. In the Settlement Agreement, the parties conclusively resolved the dispute and set forth the parties rights and obligations with respect to the Litigation Claim. The Trustee bargained for his right to subsequently challenge the Litigation Claim *on other grounds* than those stated in the Complaint in the Adversary Proceeding. PNY agreed to dismiss the Adversary Proceeding without prejudice subject to that reservation of rights.

17. The grounds for disallowance in the Adversary Proceeding centered on a “books and records” general denial of liability as stated in this Claims Objection, and disallowance under section 502(d) of the Bankruptcy Code. The instant Claims Objection merely re-states the grounds for disallowance of the Litigation Claim that the Debtor and the Trustee released in the Settlement Agreement and in direct contravention of the express terms of the Rule 41 Dismissal.

18. PNY bargained for and received the right to support its claim through a trial on the merits in the event the Trustee mounted a subsequent challenge to the Litigation Claim on some other ground than those grounds stated in the Adversary Proceeding. The Trustee’s current Objection is simply nothing more than an attempt to selectively dishonor that material provision of the bargained for agreement that is memorialized in the Settlement Agreement. PNY respectfully submits that this Court is bound to follow the plain language of the Settlement Agreement and enforce its provisions. This Court can not now make a different or better deal for the Trustee by allowing the Trustee the right to seek disallowance of PNY’s Litigation Claim by baldly asserting grounds that he has already released in the Settlement Agreement. If the Trustee has “other grounds” to challenge the claims asserted by PNY in its Litigation Claim, then the Trustee should assert that challenge by way of an adversary proceeding and afford PNY a full and fair opportunity to prove up and liquidate the Litigation Claim during a trial on the merits, consistent with the terms of the Settlement Agreement.

reached between the Trustee and PNY.

19. PNY entered into and agreed to the Rule 41 Dismissal of the Adversary Proceeding based on the express language that any subsequent challenge by the Trustee of the Litigation Claim so long as the challenge was based on the “extent and validity” of the Litigation Claim based “on other grounds” than those stated in the Complaint in the Adversary Proceeding. See Rule 41 Dismissal.

20. PNY would not have entered into the Settlement Agreement or agreed to the Rule 41 Dismissal if the Trustee could merely re-assert the same general denial in a subsequent Omnibus Claims Objection. At the time the Settlement Agreement was entered into, the parties intended that any other or further objection for the Litigation Claim would be based on some other grounds for disallowance raised by the Trustee which would then be fully and fairly resolved at trial. The Trustee has failed to raise “any other grounds” for his objection to the PNY Litigation Claim other than the grounds he has already released in the Adversary Proceeding. Thus, PNY respectfully submits that this Court should overrule the Trustee’s Objection to PNY’s Litigation Claim.²

21. PNY also respectfully requests that the Court direct the Trustee to commence an adversary proceeding should he wish to challenge the extent of validity of the Litigation Claim, and to address directly, by way of his complaint in the adversary proceeding, the allegations asserted by PNY in the Complaint filed in the District Court if he intends to challenge PNY’s Litigation Claim.

² Moreover, Rule 7001 of the Federal Rules of Bankruptcy Procedure suggests that a trustee’s challenge to the “extent or validity” of a creditor’s interest in property must be brought by way of an adversary proceeding. See FED.R.BANKR. P. 7001(2); Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995). The object of Rule 7001 is to give the creditor full and fair notice and an opportunity to defend its claims in an adversary proceeding.

22. PNY reserves its right to file supplemental or additional responses as needed or as required by the Federal Rules of Civil Procedure and/or the Federal Rules of Bankruptcy Procedure to any other or further challenges to PNY's Litigation Claim.

WHEREFORE, Claimant PNY Technologies, Inc. respectfully requests that the Court overrule the Trustee's Objection as it relates to the PNY's Litigation Claim and grant such other and further relief as this Court deems just and proper.

PNY TECHNOLOGIES, INC.

By: /s/ Neil E. McCullagh
Counsel

Robert H. Chappell, III, Esquire (VSB #31698)
Neil E. McCullagh, Esquire (VSB #39027)
Erin E. Kessel, Esquire (VSB #65360)
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Phone: (804) 697-2000
Fax: (804) 697-2100

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Counsel for PNY Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, a copy of the foregoing Response was served on the following, constituting all necessary parties, by the means indicated:

By email (to acaine@pszjlaw.com) and Federal Express Next Business Day delivery to:

Jeffrey N. Pomerantz, Esq.
Andrew W. Caine, Esq.
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Boulevard
Los Angeles, CA 90067-4100

By email (to pberan@tb-lawfirm.com) and by Hand to:

Lynn L. Tavenner, Esq.
Paula S. Beran, Esq.
Tavenner & Beran, PLC
20 North Eighth Street, 2nd Floor
Richmond, VA 23219

/s/ Neil E. McCullagh

William J. Heller
Mark H. Anania
McCARTER & ENGLISH LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 622-4444

Attorneys for Plaintiff PNY Technologies, Inc.

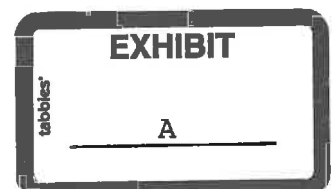
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

-----X		
PNY TECHNOLOGIES, INC.	:	Civil Action No.
	:	
Plaintiff,	:	
	:	COMPLAINT AND LOCAL
v.	:	<u>RULE 11.2 CERTIFICATION</u>
	:	
CIRCUIT CITY STORES, INC.,	:	
	:	
Defendant.	:	
-----X		

Plaintiff PNY Technologies, Inc. ("PNY" or "Plaintiff") for its complaint against
Defendant Circuit City Stores, Inc. ("Circuit City" or "Defendant") alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. PNY is a Delaware corporation with its principal place of business at 299 Webro Road, Parsippany, New Jersey 07054.
2. Circuit City is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal place of business in Virginia.



3. Pursuant to 28 U.S.C. § 1332, this Court has subject matter jurisdiction over this action based on diversity of citizenship. The amount in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs.

4. The Court has personal jurisdiction over Defendant Circuit City because Defendant is present and doing business in the State of New Jersey.

5. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391 because Circuit City is subject to personal jurisdiction in this Judicial District and because a substantial part of the events giving rise to Plaintiff's claims occurred in this Judicial District.

ALLEGATIONS COMMON TO ALL CLAIMS

6. PNY is a leading manufacturer and supplier of products used in and with computers. Among PNY's product lines are Flash Cards, which are computer memory sold as small "card" devices for insertion into computer devices.

7. Circuit City is a major national retailer of computer and other products, including Flash Cards.

8. In or about August 2006, PNY and Circuit City entered into an agreement concerning Flash Cards ("the Flash Card Agreement").

9. The Flash Card Agreement had a term of twenty-four months, with automatic renewals for like periods unless either party gave notice of termination.

10. Under the Flash Card Agreement, Circuit City agreed to buy from PNY, advertise and resell to its customers PNY Flash Card products, and represented and agreed, among other things, to run a minimum of two advertising placements per month for PNY Flash Card products during the term of the Flash Card Agreement. Sales volume at retail is determined based on the

frequency of print advertisements, among other things; therefore, the promise to provide the print ads was an important inducement for PNY to enter into the Flash Card Agreement.

11. In consideration of Circuit City's promises, representations, obligations and covenants as reflected in the Flash Card Agreement, and in reliance thereon, PNY agreed to pay to Circuit City an advance called "Marketing Development Funds" of two million dollars, payable in two installments of one million dollars each in November, 2006 and February, 2007. PNY paid those amounts to Circuit City on time and in accordance with the Flash Card Agreement. Upon information and belief, Circuit City took those payments into reported income for the fiscal year(s) when received.

12. In further consideration of Circuit City's promises, representations, obligations and covenants as reflected in the Flash Card Agreement, and in reliance thereon, PNY also agreed to provide and did provide to Circuit City additional marketing development funds, price and margin protection, allowances, rebates, price protection, and point-of-sale (POS) allowances, all of which constituted substantial discounts off of the price of PNY Flash Cards and/or cash payments to Circuit for the privilege of selling PNY Flash Card products to Circuit City.

13. Under the Flash Card Agreement, PNY first sold to Circuit City Flash Cards under the POLAROID® brand, which PNY sold under a private label agreement with Polaroid. When sales of the POLAROID® branded product did not meet Circuit City's expectations, PNY, although it was not obligated to do so, at substantial and unanticipated cost to itself, and in further reliance upon Circuit City's promises, representations, obligations and covenants in the Flash Card Agreement, accepted the return of the POLAROID® branded product in order to further the relationship with Circuit City. As a result, Circuit City was protected against any losses in connection with the purchase of PNY's POLAROID® branded product. To mitigate its

losses from these POLAROID® branded products, PNY resold the POLAROID® branded products to other customers at a lower price, as the market price for Flash Card products had dropped.

14. PNY thereafter continued to supply Flash Card products under the PNY® brand in furtherance of the Flash Card Agreement and in further reliance upon the promises, representations, obligations and covenants of Circuit City in the Flash Card Agreement.

15. During the term of the Flash Card Agreement, and in breach of its promises, representations, obligations and covenants in the Flash Card Agreement, Circuit City stopped running the required minimum ads for PNY brand Flash Card products.

16. Nothing in the Flash Card Agreement allowed Circuit City to unilaterally reduce or eliminate the required minimum ads for PNY Flash Card products.

17. As a direct and proximate result of Circuit City's breach of its promises, representations, obligations and covenants in the Flash Card Agreement and its unauthorized cessation of the ads for PNY Flash Card products, PNY had to resort to in-store activity, namely, POS rebates and allowances, and other costly programs in order to compete with other Flash Card brands that Circuit City sold and for which it was advertising.

18. By pulling PNY ads and not running the minimum ads as required by the Flash Card Agreement, Circuit City not only breached its promises, representations, obligations and covenants in the Flash Card Agreement but also placed PNY at a significant competitive disadvantage. PNY had to pay additional POS benefits to Circuit City that were not contemplated when it entered into the Flash Card Agreement. In addition, ads influence buyers to come into Circuit City stores to buy the advertised products. By advertising competitors' products and by refusing or failing to advertise PNY Flash Card products, PNY sold fewer units

than it otherwise would have sold if Circuit City had run the PNY ads as required, and further cost PNY additional and unanticipated damages due to the price protection that PNY provided to Circuit City.

19. PNY gave notice of Circuit City's breach to representatives of Circuit City, namely, Executive Vice President John Kelly and Vice President of Merchandising Elliott Becker. At a meeting in or about April 2008, attended by Messrs. Kelly and Becker from Circuit City and Messrs Gadi Cohen, CEO of PNY, and Tony Gomez, Vice President of Sales and Marketing of PNY, Mr. Gomez made a presentation confirming the damages that Circuit City had caused to PNY by its breaches of the Flash Card Agreement. Upon seeing and hearing the Gomez presentation, Mr. Becker told Mr. Cohen and Mr. Gomez that PNY had done its homework, and confirmed, and thus admitted, the accuracy of the information provided to Circuit City at that meeting.

20. Also at the same April 2008 meeting, Messrs. Kelly and Becker admitted to PNY that Circuit City had charged Mr. Becker with the responsibility to maximize gross margin dollar contributions for Circuit City; that Circuit City was an exclusive location for PNY's competitor, SanDisk, before PNY entered into the Flash Card Agreement in or about August 2006; that SanDisk was unhappy with PNY for beginning sales at Circuit City and, as a result, undercut PNY in pricing to Circuit City (which enabled Mr. Becker to maximize gross margin, as Circuit City had charged him to do); and – perhaps most important – admitted that Circuit City had entered into the Flash Card Agreement not for the purpose of fulfilling the Flash Card Agreement according to its terms, but with the undisclosed intention and ulterior motive of using PNY to extract greater benefits and higher margin from PNY's competitor, SanDisk in furtherance of its plan to increase gross margins. In essence, Circuit City used PNY to break the

exclusivity deal it allegedly had with SanDisk and as leverage to extract lower prices from SanDisk.

21. By not selling through the PNY Flash Cards that Circuit City did buy from PNY, Circuit City compounded the damages to PNY because PNY had agreed to provide, and did provide, price protection to Circuit City in a falling market.

22. PNY's costs for fulfilling the Flash Card Agreement, and in providing the benefits to Circuit City under the Flash Card Agreement exceed \$10,000,000.

FIRST CLAIM FOR RELIEF
Breach of Contract

23. Plaintiff repeats and realleges paragraphs 1 through 22 of this Complaint as if fully set forth herein.

24. PNY fully performed under the Flash Card Agreement.

25. Circuit City has breached its promises, representations, obligations and covenants in the Flash Card Agreement.

26. As a direct and proximate result of Circuit City's breach, PNY has suffered damages.

SECOND CLAIM FOR RELIEF
Breach Of The Implied Covenant Of Good Faith And Fair Dealing

27. PNY repeats and realleges paragraphs 1 through 22 of this Complaint as if fully set forth herein.

28. The actions of Circuit City, as particularly set forth above, constitute a breach of the implied covenant of good faith and fair dealing.

29. As a direct and proximate result of Circuit City's breach, PNY has suffered damages.

THIRD CLAIM FOR RELIEF
Promissory Estoppel

30. PNY repeats and realleges paragraphs 1 through 22 of this Complaint as if fully set forth herein.

31. Circuit City promised PNY that if PNY continued to make and supply products and provide the substantial discounts, allowances, marketing development funds and other benefits that Circuit City would purchase PNY Flash Card products and would advertise PNY Flash Card products at least twice monthly.

32. Circuit City knew or should have known that its promises, representations and agreements would induce action on the part of PNY.

33. Circuit City knew that PNY would and did make payments to Circuit City over the period from in or about August 2006 and thereafter in reliance on Circuit City's promises, representations, obligations and covenants in the Flash Card Agreement and otherwise.

34. PNY's reliance on Circuit City's agreements, promises and representations was reasonable under the circumstances. PNY did so rely, to its detriment. As a direct and proximate result, PNY has been damaged.

FOURTH CLAIM FOR RELIEF
Negligent Misrepresentation

35. PNY repeats and realleges paragraphs 1 through 22 and 31 – 34 of this Complaint as if fully set forth herein.

36. The aforesaid representations and promises made by Circuit City were untrue.

37. Circuit City breached a duty to PNY in making representations and warranties that were untrue.

38. As a result of PNY's reasonable reliance on Circuit City's negligent misrepresentations, PNY has been damaged.

FIFTH CLAIM FOR RELIEF
Unjust Enrichment

39. PNY repeats and realleges paragraphs 1 through 22 and 31 – 34 of this Complaint as if fully set forth herein.

40. By its conduct, Circuit City acted in bad faith and was unjustly enriched by making promises and agreements with PNY that it never intended to fulfill, and/or for ulterior motives unrelated to the purchase and sale of PNY Flash Cards.

41. PNY's continued provision of monetary benefits to Circuit City conferred a substantial benefit on Circuit City.

42. Circuit City will be unjustly enriched if it is permitted to retain the payments and benefits made by PNY, to which is was not entitled.

SIXTH CLAIM FOR RELIEF
Fraud

43. PNY repeats and realleges paragraphs 1 through 22, 31 – 34 and 40 - 42 of this Complaint as if fully set forth herein.

44. Circuit City represented to PNY that it wanted to add PNY Flash Card products to Circuit City's product line. Those representations were made in the summer of 2006 by Edward Maitland, a buyer for Circuit City, to Tony Gomez at PNY.

45. As a result of Circuit City's representations, PNY entered into the Flash Card Agreement and provided Circuit City with substantial benefits.

46. In or about 2006 Circuit City was encountering financial difficulties which continue to this day.

47. Messrs. Kelly and Becker of Circuit admitted to PNY that Circuit City entered into the Flash Card Agreement for the ulterior and then-undisclosed motive of extracting greater profits from another and preferred supplier, SanDisk, a competitor of PNY.

48. At the time Circuit City made its representations to PNY in or about 2006, it knew or should have known that they were false, and that Circuit City was using PNY as a foil to extract greater profits from a preferred supplier and to extract cash from PNY (in the form of an advance marketing development and other payments) to buoy its flagging income when it had no intention of fulfilling the Flash Card Agreement in accordance with its terms.

49. At the time Circuit City made the representations to PNY, Circuit City knew that the representations were material to PNY.

50. At the time Circuit City made the representations, Circuit City knew that they were false.

51. In making the representations to PNY, Circuit City intended to induce PNY to enter into and perform an agreement under which PNY would not get the benefits of its bargain, but under which Circuit City would not only get the benefit of its bargain with PNY, but also would increase its profits from dealing with a PNY competitor.

52. PNY relied upon the false representations of Circuit City in performing the Flash Card Agreement.

53. PNY has suffered damages as a direct and proximate result of Circuit City's conduct.

SEVENTH CLAIM FOR RELIEF
Breach of Contract

54. Plaintiff PNY entered into an agreement with Circuit City for the purchase of PNY products. Under that agreement, PNY agreed to sell, and Circuit City agreed to buy and pay for those PNY products.

55. PNY has provided all of the products required under the agreement and otherwise has performed all of its obligations under the agreements for the purchase and sale of PNY products.

56. Circuit City paid certain of the amounts owed in accordance with the agreement for the purchase and sale of PNY products.

57. Circuit City has failed to pay all amounts due and owing to PNY.

58. PNY has demanded that Circuit City make payment, but that demand has not been met.

59. PNY has given Circuit City notice of its breach and opportunities to cure.

60. Circuit City has failed to cure its breaches of the Agreement.

61. Circuit City has breached the agreement for the purchase and sale of PNY products, as a direct and proximate result of which PNY has been damaged.

EIGHTH CLAIM FOR RELIEF
Breach of Contract – Goods Sold and Delivered

62. PNY repeats the allegations of the Seventh Count as if set forth at length herein.

63. PNY sues Circuit City for products sold and delivered by PNY to Circuit City upon the promise by Circuit City to pay the agreed amounts. Payment has been demanded and has not been made.

NINTH CLAIM FOR RELIEF

Failure to Pay

64. PNY repeats the allegations of the Seventh and Eighth Count as if set forth at length herein.

65. PNY sues Circuit City for the reasonable value of products sold and delivered to Circuit City, upon the promise of Circuit City to pay a reasonable price for same. Payment has been demanded and has not been made.

TENTH CLAIM FOR RELIEF

Book Account

66. PNY repeats the allegations of the Seventh through Ninth Counts as if set forth at length herein.

67. There is due from Circuit City the sum of \$2,299,534.24, plus interest, on a certain book account. Payment has been demanded and has not been made.

ELEVENTH CLAIM FOR RELIEF

Account Stated

68. PNY repeats the allegations of the Seventh through Tenth Counts as if set forth at length herein.

69. Circuit City, being indebted to PNY in the sum of \$2,299,534.24 upon an account stated between them, did promise to pay PNY said sum upon demand. Payment has been demanded and has not been made.

PRAYER FOR RELIEF

WHEREFORE, PNY Technologies, Inc. prays that this Court enter judgment against Defendant as follows:

- A. Awarding PNY its damages, compensatory and punitive;
- B. Awarding PNY its costs and expenses of this action;
- C. Awarding PNY its attorneys' fees; and
- D. Granting such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Dated: October 27, 2008

s/ William J. Heller
William J. Heller
Mark H. Anania
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Plaintiff PNY Technologies, Inc.

CERTIFICATION PURSUANT TO LOCAL RULE 11.2

I hereby certify that the matter in controversy is not the subject of any other action or proceeding pending in any court, or of any pending arbitration.

Respectfully submitted,

Dated: October 27, 2008

s/ William J. Heller
William J. Heller
Mark H. Anania
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Plaintiff PNY Technologies, Inc.

UNITED STATES DISTRICT COURT

for the

District of New Jersey

PNY TECHNOLOGIES, INC.

Plaintiff

v.

CIRCUIT CITY STORES, INC.

Defendant

Civil Action No.

Summons in a Civil Action

To: *(Defendant's name and address)*

CIRCUIT CITY STORES, INC.
9950 MARYLAND DRIVE
RICHMOND, VIRGINIA 23233

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

WILLIAM J. HELLER, ESQ.
McCARTER & ENGLISH, LLP
FOUR GATEWAY CENTER, 100 MULBERRY STREET
NEWARK, NJ 07102

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Name of clerk of court

Date: _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

- (1) personally delivering a copy of each to the individual at this place, _____;
_____; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____; or
- (4) returning the summons unexecuted to the court clerk on _____; or
- (5) other (*specify*) _____

_____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

Date: _____

Server's signature

Printed name and title

Server's address

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff Morris

(c) Attorney's (Firm Name, Address, Telephone Number and Email Address)

William J. Heller, Esq./McCarter & English, LLP
Four Gateway Center, 100 Mulberry Street
Newark, NJ 07102
Phone: 973-622-4444 Email: wheller@mccarter.com

DEFENDANTS

County of Residence of First Listed Defendant

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input checked="" type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332

Brief description of cause:
Breach of Contract

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S)

(See instructions):

JUDGE

DOCKET NUMBER

Explanation:

DATE

SIGNATURE OF ATTORNEY OF RECORD

10/27/2008

s/William J. Heller

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases. Provide a brief explanation of why the cases are related.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 10/93) Summons in a Civil Action RETURN OF SERVICE

SERVICE OF: SUMMONS, COMPLAINT, CIVIL COVER SHEET, RULE 7.1 DISCLOSURE STATEMENT
EFFECTED (1) BY ME: CARROLL O. NEUNER
TITLE: PROCESS SERVER DATE: 30 OCT 2008
4:45 PM

CHECK ONE BOX BELOW TO INDICATE APPROPRIATE METHOD OF SERVICE:
☒ Served personally upon the defendant: Accepted By Daphene Nicholson
Legal Assistant

CIRCUIT CITY STORES, INC.
Place where served:
9950 MAYLAND Dr Richmond, VA 23233

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left:

Relationship to defendant:

Description of person accepting service:

SEX: E AGE: 30 HEIGHT: 5'6 WEIGHT: 150 SKIN: Black HAIR: Black OTHER: _____

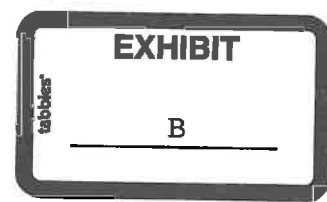
☒ To the best of my knowledge, said person was not engaged in the U.S. Military at the time of service

STATEMENT OF SERVER
TRAVEL \$ _____ SERVICES \$ _____ TOTAL \$ _____

DECLARATION OF SERVER
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in this Return of Service and Statement of Server is true and correct.
DATE OCT 30 2008 CARROLL O NEUNER L.S.
SIGNATURE OF [Signature]
GUARANTEED SUBPOENA SERVICE, INC.
2009 MORRIS AVENUE
UNION, NJ 07083

ATTORNEY: WILLIAM J HELLER, ESQ
PLAINTIFF: PNY TECHNOLOGIES, INC
DEFENDANT: CIRCUIT CITY STORES, INC
VENUE: DISTRICT OF NEW JERSEY
DOCKET: 08 CV 5281 (WJM)

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.



Printed name and title
Private Process Server
2009 Morris Avenue
Union, NJ 07083
(800) 672-1952
Server's address

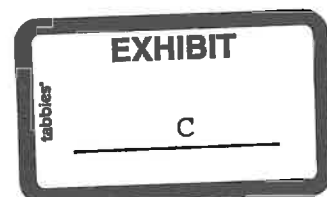
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

PNY TECHNOLOGIES, INC.,)
)
)
Plaintiff)
) Civil Action No. 08cv5281 (WJM)
v.)
)
CIRCUIT CITY STORES, INC.)
)
Defendant.)

**SUGGESTION OF BANKRUPTCY
AND NOTICE OF OPERATION OF AUTOMATIC STAY**

PLEASE BE ADVISED that on November 10, 2008, Circuit City Stores, Inc., and certain of its direct and indirect subsidiaries (collectively the "Debtors"),¹ filed voluntary petitions for reorganization relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, as amended (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division (the "Bankruptcy Court"). The

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), Prahs, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courcheval, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 9950 Mayland Drive, Richmond, Virginia 23233.



Debtors' bankruptcy cases are being jointly administered under In re Circuit City Stores, Inc., Case No. 08-35653 (E.D. Va.). As a result of the filing, any further action against the Debtors is stayed under Bankruptcy Code section 362.

PLEASE BE FURTHER ADVISED that any action taken against the Debtors or their property without first obtaining relief from the automatic stay from the Bankruptcy Court may be subject to findings of contempt and the assessment by the Bankruptcy Court of penalties, fines, and/or sanction, as may be appropriate.

Dated: November 14, 2008

Respectfully submitted,

/s/ Suzette T. Rodriguez
Suzette T. Rodriguez, Esq.
LeClairRyan, A Professional
Corporation
Two Penn Plaza East
Newark, New Jersey 07105
(973) 491-3306
(973) 491-3552 (facsimile)

CERTIFICATE OF SERVICE

I, Suzette T. Rodriguez, an attorney, certify that I have served the following parties with SUGGESTION OF VOLUNTARY BANKRUPTCY AND NOTICE OF OPERATION OF AUTOMATIC STAY via ECF and First Class Mail:

William J. Heller, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Counsel for Plaintiff PNY Technologies, Inc.

Dated: November 14, 2008

/s/ Suzette T. Rodriguez
Suzette T. Rodriguez, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PNY TECHNOLOGIES, INC.,

CIVIL ACTION 08-5281 WJM

Plaintiff,

V.

ORDER

CIRCUIT CITY STORES, INC.

Defendant.

It appearing that proceedings in the above matter have been stayed pending the filing of an voluntary Chapter 11 Petition on November 10, 2008 in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, bearing Docket No. 08-35653.

It is on this 21st day of November, 2008

ORDERED that the Clerk administratively terminate the action in his records, without prejudice to the right of the parties to reopen the proceedings for good cause shown for the entry of any stipulation of order, or for any other purpose required to obtain a final determination of the litigation.

s/William J. Martini

WILLIAM J. MARTINI, U.S.D.J.



United States Bankruptcy Court for the Eastern District of Virginia		PROOF OF CLAIM
Name of Debtor Circuit City Stores, Inc.		Case Number 08-35653
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property): PNY Technologies, Inc.		COPY
Name and address where notices should be sent: McCarter & English, LLP Attn: Clement J. Farley Four Gateway Center 100 Mulberry Street Newark, New Jersey 07102-4096		
Telephone number: (973) 622-4444		
Account or other number by which creditor identifies debtor:		
<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.		This Space Is for Court Use Only
Check here <input type="checkbox"/> replaces If this claim <input type="checkbox"/> amends a previously filed claim, dated: _____		
1. Basis for Claim: <input checked="" type="checkbox"/> Goods Sold <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Services performed <input type="checkbox"/> Wages, salaries, and compensation (fill out below) <input type="checkbox"/> Money loaned Your SS #: _____ <input type="checkbox"/> Personal injury/wrongful death Unpaid compensation for services performed Taxes from _____ to _____ <input type="checkbox"/> Other _____ (date) (date)		
2. Date debt was incurred: August 2006		
3. If court judgment, date obtained:		
4. Total Amount of Claim at Time Case Filed: at least \$10,000,000 If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Secured Claim: <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff) Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral: \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____		6. Unsecured Priority Claim: <input type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, commissions (up to \$4,000),* earned within 90 days before filing of The bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$1,800* of deposits toward purchase, lease, or rental of property or services for Personal, family, or household use - 11 U.S.C. § 507(a)(6) <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____). <small>*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
7. Credits: The amount of all payments on this claim has been credited and deducted for the Purpose of making this proof of claim. 8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. 9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a Stamped, self-addressed envelope and copy of this proof of claim.		This Space Is for Court Use Only <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 150px;"> RECEIVED DEC 16 2008 KURTZMAN CARSON CONSULTANTS </div>
Date: 12/15/08 Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): McCarter & English, LLP By: Clement J. Farley, A Member of the Firm		

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Secured Claim

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also Unsecured Claim.)

Unsecured Claim

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims*.

Items to be completed in Proof of Claim form (if not already filled in)

Court, Name of Debtor, and Case Number

Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:

Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form

1. Basis for Claim:

Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:

Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:

If you have a court judgment for this debt, state the date the court entered the judgment

4. Total Amount of Claim at Time Case Filed:

Fill in the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

5. Secured Claim:

Check the appropriate place if the claim is a secured claim. You must state the type and value of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

6. Unsecured Property Claim:

Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

7. Credits

By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

8. Supporting Documents:

You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444
Attorneys for PNY Technologies, Inc.

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

In re:	:	Case No. 08-35653
	:	
	:	Chapter 11
CIRCUIT CITY STORES, INC., <u>et al.</u> ¹ ,	:	
	:	
Debtors.	:	Jointly Administered

ATTACHMENT TO PROOF OF CLAIM

1. The undersigned, having offices at Four Gateway Center, 100 Mulberry Street, Newark, New Jersey 07102, are attorneys for PNY Technologies, Inc. (the "Claimant"), and are authorized to make this Proof of Claim on its behalf against the estate of Circuit City Stores, Inc. (the "Debtor").

2. The post office address of the Claimant, and the address to which all notices should be mailed, is as follows:

¹ The Debtors are as follows: Circuit City Stores, Inc., Circuit City Stores West Coast, Inc., InterTAN, Inc., Ventoux International, Inc., Circuit City Purchasing Company, LLC, CC Aviation, LLC, CC Distribution Company of Virginia, Inc., Circuit City Properties, LLC, Kinzer Technology, LLC, Abbott Advertising Agency, Inc., Patapsco Designs, Inc., Sky Venture Corp., PRAHS, INC., XSStuff, LLC, Mayland MN, LLC, Courchevel, LLC, Orbyx Electronics, LLC, and Circuit City Stores PR, LLC.

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Attn: Clement J. Farley

3. The Claimant is unaware of anyone else who has filed a Proof of Claim relating to this claim.

4. The Claimant is the current holder of the claims set forth herein.

5. On November 10, 2008, the Debtor filed a petition under Chapter 11 of the United States Code (the "Petition Date").

Background of Claim

6. The Claimant commenced an action on October 27, 2008, against the Debtor, in the United States District Court for the District of New Jersey, Case No. 2:08-cv-05281 (the "Litigation") seeking a judgment against the Debtor in excess of \$10,000,000 based upon the Debtor's breach of an agreement concerning Flash Cards (computer memory small "card" devices for insertion into computer devices) that was entered into by the Claimant and the Debtor in or about August 2006. In addition to breach of contract, there are additional counts against the Debtor for breach of the implied covenant of good faith and fair dealing, promissory estoppel, negligent misrepresentation, unjust enrichment, fraud, failure to pay, book account and account stated (the "Complaint"). A true and correct copy of the Claimants's Complaint is attached hereto and incorporated herein as Exhibit A.

The Amount of the Claim

7. No sums have been paid to the Claimant on account of the prepetition claims the Claimant has against the Debtor in at least the amount of \$2,299,534.24 for amounts due to the Claimant on a certain book account, plus other sums that would be awarded for compensatory damages, punitive damages, attorneys' fees, costs and expenses. As no judgment has been entered against the Debtor, the amount due and owing is estimated to be at least as much as claimed in the Complaint, which is in excess of \$10,000,000.

8. The Claimant hereby reserves its right to amend this Proof of Claim for purposes of amending amounts due or re-classifying the character of the claim (i.e., over-secured, under-secured, priority, etc.).

McCARTER & ENGLISH, LLP
Attorneys for PNY Technologies, Inc.

By: _____

CLEMENT J. FARLEY
A Member of the Firm

DATED: 12/15/08

Exhibit A

William J. Heller
Mark H. Anania
McCARTER & ENGLISH LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 622-4444

Attorneys for Plaintiff PNY Technologies, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

-----X	
PNY TECHNOLOGIES, INC.	: Civil Action No.
Plaintiff,	:
v.	:
	: <u>COMPLAINT AND LOCAL</u>
	: <u>RULE 11.2 CERTIFICATION</u>
CIRCUIT CITY STORES, INC.,	:
Defendant.	:
-----X	

Plaintiff PNY Technologies, Inc. ("PNY" or "Plaintiff") for its complaint against
Defendant Circuit City Stores, Inc. ("Circuit City" or "Defendant") alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. PNY is a Delaware corporation with its principal place of business at 299 Webro Road, Parsippany, New Jersey 07054.
2. Circuit City is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal place of business in Virginia.

3. Pursuant to 28 U.S.C. § 1332, this Court has subject matter jurisdiction over this action based on diversity of citizenship. The amount in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs.

4. The Court has personal jurisdiction over Defendant Circuit City because Defendant is present and doing business in the State of New Jersey.

5. Venue is appropriate in this Court pursuant to 28 U.S.C. §1391 because Circuit City is subject to personal jurisdiction in this Judicial District and because a substantial part of the events giving rise to Plaintiff's claims occurred in this Judicial District.

ALLEGATIONS COMMON TO ALL CLAIMS

6. PNY is a leading manufacturer and supplier of products used in and with computers. Among PNY's product lines are Flash Cards, which are computer memory sold as small "card" devices for insertion into computer devices.

7. Circuit City is a major national retailer of computer and other products, including Flash Cards.

8. In or about August 2006, PNY and Circuit City entered into an agreement concerning Flash Cards ("the Flash Card Agreement").

9. The Flash Card Agreement had a term of twenty-four months, with automatic renewals for like periods unless either party gave notice of termination.

10. Under the Flash Card Agreement, Circuit City agreed to buy from PNY, advertise and resell to its customers PNY Flash Card products, and represented and agreed, among other things, to run a minimum of two advertising placements per month for PNY Flash Card products during the term of the Flash Card Agreement. Sales volume at retail is determined based on the

frequency of print advertisements, among other things; therefore, the promise to provide the print ads was an important inducement for PNY to enter into the Flash Card Agreement.

11. In consideration of Circuit City's promises, representations, obligations and covenants as reflected in the Flash Card Agreement, and in reliance thereon, PNY agreed to pay to Circuit City an advance called "Marketing Development Funds" of two million dollars, payable in two installments of one million dollars each in November, 2006 and February, 2007. PNY paid those amounts to Circuit City on time and in accordance with the Flash Card Agreement. Upon information and belief, Circuit City took those payments into reported income for the fiscal year(s) when received.

12. In further consideration of Circuit City's promises, representations, obligations and covenants as reflected in the Flash Card Agreement, and in reliance thereon, PNY also agreed to provide and did provide to Circuit City additional marketing development funds, price and margin protection, allowances, rebates, price protection, and point-of-sale (POS) allowances, all of which constituted substantial discounts off of the price of PNY Flash Cards and/or cash payments to Circuit for the privilege of selling PNY Flash Card products to Circuit City.

13. Under the Flash Card Agreement, PNY first sold to Circuit City Flash Cards under the POLAROID® brand, which PNY sold under a private label agreement with Polaroid. When sales of the POLAROID® branded product did not meet Circuit City's expectations, PNY, although it was not obligated to do so, at substantial and unanticipated cost to itself, and in further reliance upon Circuit City's promises, representations, obligations and covenants in the Flash Card Agreement, accepted the return of the POLAROID® branded product in order to further the relationship with Circuit City. As a result, Circuit City was protected against any losses in connection with the purchase of PNY's POLAROID® branded product. To mitigate its

losses from these POLAROID® branded products, PNY resold the POLAROID® branded products to other customers at a lower price, as the market price for Flash Card products had dropped.

14. PNY thereafter continued to supply Flash Card products under the PNY® brand in furtherance of the Flash Card Agreement and in further reliance upon the promises, representations, obligations and covenants of Circuit City in the Flash Card Agreement.

15. During the term of the Flash Card Agreement, and in breach of its promises, representations, obligations and covenants in the Flash Card Agreement, Circuit City stopped running the required minimum ads for PNY brand Flash Card products.

16. Nothing in the Flash Card Agreement allowed Circuit City to unilaterally reduce or eliminate the required minimum ads for PNY Flash Card products.

17. As a direct and proximate result of Circuit City's breach of its promises, representations, obligations and covenants in the Flash Card Agreement and its unauthorized cessation of the ads for PNY Flash Card products, PNY had to resort to in-store activity, namely, POS rebates and allowances, and other costly programs in order to compete with other Flash Card brands that Circuit City sold and for which it was advertising.

18. By pulling PNY ads and not running the minimum ads as required by the Flash Card Agreement, Circuit City not only breached its promises, representations, obligations and covenants in the Flash Card Agreement but also placed PNY at a significant competitive disadvantage. PNY had to pay additional POS benefits to Circuit City that were not contemplated when it entered into the Flash Card Agreement. In addition, ads influence buyers to come into Circuit City stores to buy the advertised products. By advertising competitors' products and by refusing or failing to advertise PNY Flash Card products, PNY sold fewer units

than it otherwise would have sold if Circuit City had run the PNY ads as required, and further cost PNY additional and unanticipated damages due to the price protection that PNY provided to Circuit City.

19. PNY gave notice of Circuit City's breach to representatives of Circuit City, namely, Executive Vice President John Kelly and Vice President of Merchandising Elliott Becker. At a meeting in or about April 2008, attended by Messrs. Kelly and Becker from Circuit City and Messrs Gadi Cohen, CEO of PNY, and Tony Gomez, Vice President of Sales and Marketing of PNY, Mr. Gomez made a presentation confirming the damages that Circuit City had caused to PNY by its breaches of the Flash Card Agreement. Upon seeing and hearing the Gomez presentation, Mr. Becker told Mr. Cohen and Mr. Gomez that PNY had done its homework, and confirmed, and thus admitted, the accuracy of the information provided to Circuit City at that meeting.

20. Also at the same April 2008 meeting, Messrs. Kelly and Becker admitted to PNY that Circuit City had charged Mr. Becker with the responsibility to maximize gross margin dollar contributions for Circuit City; that Circuit City was an exclusive location for PNY's competitor, SanDisk, before PNY entered into the Flash Card Agreement in or about August 2006; that SanDisk was unhappy with PNY for beginning sales at Circuit City and, as a result, undercut PNY in pricing to Circuit City (which enabled Mr. Becker to maximize gross margin, as Circuit City had charged him to do); and – perhaps most important – admitted that Circuit City had entered into the Flash Card Agreement not for the purpose of fulfilling the Flash Card Agreement according to its terms, but with the undisclosed intention and ulterior motive of using PNY to extract greater benefits and higher margin from PNY's competitor, SanDisk in furtherance of its plan to increase gross margins. In essence, Circuit City used PNY to break the

exclusivity deal it allegedly had with SanDisk and as leverage to extract lower prices from SanDisk.

21. By not selling through the PNY Flash Cards that Circuit City did buy from PNY, Circuit City compounded the damages to PNY because PNY had agreed to provide, and did provide, price protection to Circuit City in a falling market.

22. PNY's costs for fulfilling the Flash Card Agreement, and in providing the benefits to Circuit City under the Flash Card Agreement exceed \$10,000,000.

FIRST CLAIM FOR RELIEF
Breach of Contract

23. Plaintiff repeats and realleges paragraphs 1 through 22 of this Complaint as if fully set forth herein.

24. PNY fully performed under the Flash Card Agreement.

25. Circuit City has breached its promises, representations, obligations and covenants in the Flash Card Agreement.

26. As a direct and proximate result of Circuit City's breach, PNY has suffered damages.

SECOND CLAIM FOR RELIEF
Breach Of The Implied Covenant Of Good Faith And Fair Dealing

27. PNY repeats and realleges paragraphs 1 through 22 of this Complaint as if fully set forth herein.

28. The actions of Circuit City, as particularly set forth above, constitute a breach of the implied covenant of good faith and fair dealing.

29. As a direct and proximate result of Circuit City's breach, PNY has suffered damages.

THIRD CLAIM FOR RELIEF
Promissory Estoppel

30. PNY repeats and realleges paragraphs 1 through 22 of this Complaint as if fully set forth herein.

31. Circuit City promised PNY that if PNY continued to make and supply products and provide the substantial discounts, allowances, marketing development funds and other benefits that Circuit City would purchase PNY Flash Card products and would advertise PNY Flash Card products at least twice monthly.

32. Circuit City knew or should have known that its promises, representations and agreements would induce action on the part of PNY.

33. Circuit City knew that PNY would and did make payments to Circuit City over the period from in or about August 2006 and thereafter in reliance on Circuit City's promises, representations, obligations and covenants in the Flash Card Agreement and otherwise.

34. PNY's reliance on Circuit City's agreements, promises and representations was reasonable under the circumstances. PNY did so rely, to its detriment. As a direct and proximate result, PNY has been damaged.

FOURTH CLAIM FOR RELIEF
Negligent Misrepresentation

35. PNY repeats and realleges paragraphs 1 through 22 and 31 – 34 of this Complaint as if fully set forth herein.

36. The aforesaid representations and promises made by Circuit City were untrue.

37. Circuit City breached a duty to PNY in making representations and warranties that were untrue.

38. As a result of PNY's reasonable reliance on Circuit City's negligent misrepresentations, PNY has been damaged.

FIFTH CLAIM FOR RELIEF
Unjust Enrichment

39. PNY repeats and realleges paragraphs 1 through 22 and 31 – 34 of this Complaint as if fully set forth herein.

40. By its conduct, Circuit City acted in bad faith and was unjustly enriched by making promises and agreements with PNY that it never intended to fulfill, and/or for ulterior motives unrelated to the purchase and sale of PNY Flash Cards.

41. PNY's continued provision of monetary benefits to Circuit City conferred a substantial benefit on Circuit City.

42. Circuit City will be unjustly enriched if it is permitted to retain the payments and benefits made by PNY, to which is was not entitled.

SIXTH CLAIM FOR RELIEF
Fraud

43. PNY repeats and realleges paragraphs 1 through 22, 31 – 34 and 40 - 42 of this Complaint as if fully set forth herein;

44. Circuit City represented to PNY that it wanted to add PNY Flash Card products to Circuit City's product line. Those representations were made in the summer of 2006 by Edward Maitland, a buyer for Circuit City, to Tony Gomez at PNY.

45. As a result of Circuit City's representations, PNY entered into the Flash Card Agreement and provided Circuit City with substantial benefits.

46. In or about 2006 Circuit City was encountering financial difficulties which continue to this day.

47. Messrs. Kelly and Becker of Circuit admitted to PNY that Circuit City entered into the Flash Card Agreement for the ulterior and then-undisclosed motive of extracting greater profits from another and preferred supplier, SanDisk, a competitor of PNY.

48. At the time Circuit City made its representations to PNY in or about 2006, it knew or should have known that they were false, and that Circuit City was using PNY as a foil to extract greater profits from a preferred supplier and to extract cash from PNY (in the form of an advance marketing development and other payments) to buoy its flagging income when it had no intention of fulfilling the Flash Card Agreement in accordance with its terms.

49. At the time Circuit City made the representations to PNY, Circuit City knew that the representations were material to PNY.

50. At the time Circuit City made the representations, Circuit City knew that they were false.

51. In making the representations to PNY, Circuit City intended to induce PNY to enter into and perform an agreement under which PNY would not get the benefits of its bargain, but under which Circuit City would not only get the benefit of its bargain with PNY, but also would increase its profits from dealing with a PNY competitor.

52. PNY relied upon the false representations of Circuit City in performing the Flash Card Agreement.

53. PNY has suffered damages as a direct and proximate result of Circuit City's conduct.

SEVENTH CLAIM FOR RELIEF
Breach of Contract

54. Plaintiff PNY entered into an agreement with Circuit City for the purchase of PNY products. Under that agreement, PNY agreed to sell, and Circuit City agreed to buy and pay for those PNY products.

55. PNY has provided all of the products required under the agreement and otherwise has performed all of its obligations under the agreements for the purchase and sale of PNY products.

56. Circuit City paid certain of the amounts owed in accordance with the agreement for the purchase and sale of PNY products.

57. Circuit City has failed to pay all amounts due and owing to PNY.

58. PNY has demanded that Circuit City make payment, but that demand has not been met.

59. PNY has given Circuit City notice of its breach and opportunities to cure.

60. Circuit City has failed to cure its breaches of the Agreement.

61. Circuit City has breached the agreement for the purchase and sale of PNY products, as a direct and proximate result of which PNY has been damaged.

EIGHTH CLAIM FOR RELIEF
Breach of Contract – Goods Sold and Delivered

62. PNY repeats the allegations of the Seventh Count as if set forth at length herein.

63. PNY sues Circuit City for products sold and delivered by PNY to Circuit City upon the promise by Circuit City to pay the agreed amounts. Payment has been demanded and has not been made.

NINTH CLAIM FOR RELIEF
Failure to Pay

64. PNY repeats the allegations of the Seventh and Eighth Count as if set forth at length herein.

65. PNY sues Circuit City for the reasonable value of products sold and delivered to Circuit City, upon the promise of Circuit City to pay a reasonable price for same. Payment has been demanded and has not been made.

TENTH CLAIM FOR RELIEF
Book Account

66. PNY repeats the allegations of the Seventh through Ninth Counts as if set forth at length herein.

67. There is due from Circuit City the sum of \$2,299,534.24, plus interest, on a certain book account. Payment has been demanded and has not been made.

ELEVENTH CLAIM FOR RELIEF
Account Stated

68. PNY repeats the allegations of the Seventh through Tenth Counts as if set forth at length herein.

69. Circuit City, being indebted to PNY in the sum of \$2,299,534.24 upon an account stated between them, did promise to pay PNY said sum upon demand. Payment has been demanded and has not been made.

PRAYER FOR RELIEF

WHEREFORE, PNY Technologies, Inc. prays that this Court enter judgment against Defendant as follows:

- A. Awarding PNY its damages, compensatory and punitive;**
- B. Awarding PNY its costs and expenses of this action;**
- C. Awarding PNY its attorneys' fees; and**
- D. Granting such other and further relief as this Court may deem just and proper.**

Respectfully submitted,

Dated: October 27, 2008

s/ William J. Heller
William J. Heller
Mark H. Anania
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Plaintiff PNY Technologies, Inc.

CERTIFICATION PURSUANT TO LOCAL RULE 11.2

I hereby certify that the matter in controversy is not the subject of any other action or proceeding pending in any court, or of any pending arbitration.

Respectfully submitted,

Dated: October 27, 2008

s/ William J. Heller
William J. Heller
Mark H. Anania
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Plaintiff PNY Technologies, Inc.

AO 440 (Rev. 04/08) Civil Summons

UNITED STATES DISTRICT COURT

for the

District of New Jersey

PNY TECHNOLOGIES, INC.

Plaintiff

v.

CIRCUIT CITY STORES, INC.

Defendant

Civil Action No.

Summons in a Civil Action

To: (Defendant's name and address)

CIRCUIT CITY STORES, INC.
9950 MARYLAND DRIVE
RICHMOND, VIRGINIA 23233

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

WILLIAM J. HELLER, ESQ.
McCARTER & ENGLISH, LLP
FOUR GATEWAY CENTER, 100 MULBERRY STREET
NEWARK, NJ 07102

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Name of clerk of court

Date: _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

AO 440 (Rev. 04/08) Civil Summons (Page 2)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

(1) personally delivering a copy of each to the individual at this place, _____;
_____ ; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____ ; or

(4) returning the summons unexecuted to the court clerk on _____ ; or

(5) other (*specify*) _____

_____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

Date: _____

Server's signature

Printed name and title

Server's address

JS 44 (Rev. 12/07, NJ 508)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS PNY TECHNOLOGIES, INC.	DEFENDANTS CIRCUIT CITY STORES, INC.
(b) County of Residence of First Listed Plaintiff <u>Morris</u>	County of Residence of First Listed Defendant _____
(c) Attorney's (Firm Name, Address, Telephone Number and Email Address) William J. Heller, Esq./McCarter & English, LLP Four Gateway Center, 100 Mulberry Street Newark, NJ 07102 Phone: 973-622-4444 Email: wheller@mccarter.com	NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. Attorneys (If Known) _____

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)																								
<input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td><input checked="" type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="checkbox"/> 5</td> <td><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input checked="" type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT (Place an "X" in One Box Only)			
CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FOREFAITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUIES <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	SYNDICATES <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISON APPEALS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only) <input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed from State Court <input type="checkbox"/> 3 Remanded from Appellate Court <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from another district (specify) _____ <input type="checkbox"/> 6 Multidistrict Litigation <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment	Appeal to District Judge from Magistrate Judgment
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VI. CAUSE OF ACTION	Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): <u>28 U.S.C. § 1332</u> Brief description of cause: <u>Breach of Contract</u>
----------------------------	---

VII. REQUESTED IN COMPLAINT:	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
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VIII. RELATED CASE(S) (See instructions): JUDGE _____	DOCKET NUMBER _____
--	---------------------

Explanation:

DATE <u>10/27/2008</u>	SIGNATURE OF ATTORNEY OF RECORD <u>s/William J. Heller</u>
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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases. Provide a brief explanation of why the cases are related.

Date and Attorney Signature. Date and sign the civil cover sheet.

Jeffrey N. Pomerantz, Esq.
 Andrew W. Caine, Esq.
 (admitted pro hac vice)
 PACHULSKI STANG ZIEHL &
 JONES LLP
 10100 Santa Monica Boulevard
 Los Angeles, California 90067-4100
 Telephone: (310) 277-6910
 Telecopy: (310) 201-0760

Counsel to the Circuit City Stores, Inc.
 Liquidating Trust

Lynn L. Tavenner, Esq. (VA Bar No. 30083)
 Paula S. Beran, Esq. (VA Bar No. 34679)
 TAVENNER & BERAN, PLC
 20 North Eighth Street, 2nd Floor
 Richmond, Virginia 23219
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 Telecopy: (804) 783-0178

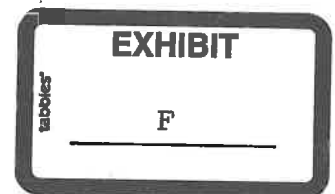
Counsel to the Circuit City Stores, Inc.
 Liquidating Trust

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE EASTERN DISTRICT OF VIRGINIA
 RICHMOND DIVISION

-----	x	
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC., et al.,	:	Case No. 08-35653 (KRH)
	:	
Debtors.	:	
-----	:	Jointly Administered
	x	

SETTLEMENT AGREEMENT AND STIPULATION BY AND AMONG THE
 CIRCUIT CITY STORES, INC. LIQUIDATING TRUST AND
 PNY TECHNOLOGIES, INC.

This settlement agreement and stipulation (this "Agreement") is entered into by and among the Circuit City Stores, Inc. Liquidating Trust (the "Trust"), on the one hand, and PNY Technologies, Inc. ("PNY"), on the other hand ("PNY" and the "Trust" may be referenced herein as the "Parties", and/or each as a "Party").



GENERAL BACKGROUND

WHEREAS, on November 10, 2008 (the "Petition Date"), the Debtors in the above-captioned captioned cases (the "Debtors")¹ each filed a voluntary petition in the United States Bankruptcy Court for the Eastern District of Virginia (the "Court") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"); and

WHEREAS, on November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"); and

WHEREAS, on January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement") between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores. On or about March 8, 2009, the going out of business sales concluded; and

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, INC. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512).

WHEREAS, on September 29, 2009, the Debtors and the Creditors Committee filed the First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors In Possession and its Official Committee of Creditors Holding General Unsecured Claims (the "First Amended Plan"). The associated disclosure statement (the "Disclosure Statement") was approved on September 24, 2009. Confirmation of the First Amended Plan was originally scheduled for November 23, 2009, but was adjourned from time to time; and

WHEREAS, on August 9, 2010, the Debtors and the Creditors' Committee filed the Second Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors In Possession and its Official Committee of Creditors Holding General Unsecured Claims (the "Plan"), and the Plan was confirmed on September 10, 2010; and

WHEREAS, the Plan became effective on November 1, 2010, and pursuant to the Plan and Liquidating Trust Agreement approved therewith, the Trust assumed the right and responsibility to liquidate the Debtors' remaining assets and distribute the proceeds to creditors; and

WHEREAS, the Trust is authorized under the Plan and Liquidating Trust Agreement to settle claims and causes of action, subject to the notice provisions therein.

SETTLEMENT BACKGROUND

WHEREAS, the Debtors and PNY had various business relationships prior to the filing of the Petition Date, relating to the Debtors' operation of Circuit City retail stores;

WHEREAS, on or about December 1, 2008, PNY filed claim number 447 ("Claim No. 447") in the total amount of \$1,723,312.08, asserting 503(b)(9) priority as to a portion of the claim, and as a general unsecured, non-priority entitlement as to the balance; and

WHEREAS following objection by the Debtors, the Court approved a stipulation of the Parties that the entirety of Claim No. 447 was, if valid, entitled to general unsecured non-priority status; and

WHEREAS, on or about December 16, 2008, PNY filed claim number 1723 ("Claim No. 1723") as a general unsecured, non-priority claim in an unliquidated amount, arising from prepetition litigation commenced in the District Court of New Jersey, which litigation was stayed by the filing of the Debtors' Cases; and

WHEREAS, on or about August 20, 2009, the Debtors filed their 31st Omnibus Claims Objection, which included an Objection to Claim No. 1723. The Debtors' Objection to Claim No. 1723 was continued from time to time; and

WHEREAS, on March 23, 2010, the Debtors filed a complaint initiating an adversary proceeding against PNY, No. 10-3056 (the "Adversary Proceeding"), pursuant to which the Debtors asserted that they are entitled to recover

certain Unpaid Obligations (as defined in the Complaint) and, pursuant to Bankruptcy Code sections 547 and 550, avoid and recover alleged preferential transfers made during the 90-day period prior to the Petition Date, and which incorporated and superceded the Debtors' Objections to Claim Nos. 447 and 1723; and

WHEREAS, rather than proceed with litigation concerning Claim Nos. 447 and 1723 and the Adversary Proceeding, the Parties engaged in good faith, arms' length negotiations to resolve the foregoing in their entirety; and

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby STIPULATE AND AGREE that:

1. The above recital clauses are incorporated by reference in this Stipulation as if fully set forth herein.
2. **Claim No. 447.** Claim No. 447 shall be reduced to the amount of \$538,000, and shall be allowed as a general unsecured non-priority claim in the amount of \$538,000. The balance of Claim No. 447 as originally asserted shall be disallowed in its entirety.
3. **Adversary Proceeding.** On the Effective Date, as defined in paragraph 16 below, the Adversary Proceeding shall be dismissed with prejudice as to all counts EXCEPT the objections to Claim No. 1723, which counts shall be dismissed without prejudice. To the extent the Debtors' 31st Omnibus Objection to

Claim No. 1723 remains active or pending on the Court's docket, the Trust shall modify or withdraw its Claims Objection to Claim No. 1723, subject to the Trust's right to renew its Objection in accordance with paragraph 5 below. The Parties shall take all necessary steps and file all necessary pleadings with the Court to timely dismiss the Adversary Proceeding and that portion of the 31st Omnibus Claims Objection in accordance with this Agreement.

4. **Contracts.** Any and all contracts by and between the Parties, including but not limited to the Contract, not previously terminated or rejected, shall be deemed rejected as of the Effective Date.

5. **Claim No. 1723.** The Parties reserve all rights with respect to Claim No. 1723, including the Trust's right to timely object to the claim and PNY's right to prosecute the claim fully.

6. **Resolution of Claims and Disputes.** The Parties are entering into this Settlement Agreement to resolve all matters of dispute or potential dispute arising out of claims related to or asserted in, or which could have been asserted in the Adversary Proceeding and Claim No. 447, and any other claims by and between the Parties, whether or not such claims are known or unknown to the Parties, and whether or not such claims have been asserted by the Parties, EXCEPT those claims asserted by PNY in Claim No. 1723, and any unasserted claims that, as a matter of law, would relate back to the complaint that underlies Claim No. 1723. Any and all other claims against the Trust, the Debtors and/or their estates, collectively or individually, by or on behalf of PNY, expressly including any claim that PNY might

be entitled to file under Bankruptcy Code section 502(h), are hereby irrevocably withdrawn, disallowed, and expunged in their entirety except as stated herein. Any and all other claims against PNY, collectively or individually, by or on behalf of the Trust, or the Debtors and their estates are hereby irrevocably withdrawn, released, and expunged in their entirety except as stated herein.

7. **Trust's Release.** As of the Effective Date, the Trust, without the need for additional documentation or the entry of any additional orders, except as expressly provided in this Settlement Agreement, on behalf of itself, the Debtors and their bankruptcy estates, together with each of their affiliates, parents, agents, subsidiaries, and the successors and assigns of any of them, and any other person or entity that claims or might claim through, on behalf of or for the benefit of any of the foregoing (collectively, the "Trust Releasor"), shall be deemed to have irrevocably and unconditionally, fully, finally and forever waived, released, acquitted and discharged PNY, its past or present affiliates, attorneys, directors, employees, officers, parents, agents, subsidiaries, and the successors and assigns of any of them (the "PNY Releasees"), from any and all manner of actions, causes of action, suits, costs, debts, liabilities, obligations, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, of whatever kind or nature, whether known or unknown, suspected or unsuspected, in law or equity, which the Trust Releasor or the Debtors, from the beginning of time through the Effective Date, have, have had, may have or may

claim to have against any PNY Releasees, including, without limitation, any and all claims asserted in or which could have been asserted in, or which relate to the subject matter of the Adversary Proceeding and Claim No. 447, as well as any and all claims that may have arisen or may relate to any other events, activities, or occurrences that have taken place or take place on or before the Effective Date (collectively, the "Trust's Released Claims"). The Parties intend that this release shall be a general release, subject only to any exclusions set forth herein, and the inclusion of the foregoing specifically included released matters shall not be construed as detracting from the purposefully general nature of this release.

8. **PNY's Release.** Effective on the Effective Date, PNY, without the need for additional documentation or the entry of any additional orders, except as expressly provided in this Settlement Agreement, on behalf of itself and each of its affiliates, parents, agents, subsidiaries, and the successors and assigns of any of them, and any other person or entity that claims or might claim through, on behalf of or for the benefit of any of the foregoing (collectively, the "PNY Releasors"), shall be deemed to have irrevocably and unconditionally, fully, finally and forever waived, released, acquitted and discharged the Trust, the Debtors, their past or present affiliates, attorneys, directors, employees, officers, parents, agents subsidiaries, and the successors and assigns of any of them (collectively, the "Trust Releasees"), from any and all manner of actions, causes of action, suits, costs, debts, liabilities, obligations, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses,

damages, judgments, executions, claims and demands whatsoever, of whatever kind or nature, whether known or unknown, suspected or unsuspected, in law or equity, which the PNY Releasors, or any of them, from the beginning of time through the Effective Date, have, have had, may have or may claim to have against any of the Trust Releasees, including, without limitation, any and all claims asserted in or which could have been asserted in, or which relate to the subject matter of the Adversary Proceeding and Claim No. 447, except for PNY's claims or causes of action related to Claim No. 1723, including any claim that PNY might be entitled to filed under Bankruptcy Code section 502(h), as well as any and all claims that may have arisen or may relate to any other events, activities, or occurrences that have taken place or take place on or before the Effective Date (collectively, the "PNY Released Claims"). The Parties intend that this release shall be a general release, subject only to any exclusions set forth herein, and the inclusion of the foregoing specifically included released matters shall not be construed as detracting from the purposefully general nature of this release.

9. As to the mutual releases contained herein, the Trust Releasor and PNY Releasors hereby expressly waive and relinquish, to the fullest extent permitted by law, the benefits of California Civil Code section 1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

or any similar law in any other jurisdiction.

10. **No Admissions.** This Settlement Agreement is not and shall not in any way be construed as an admission by the Parties of any allegations asserted in the Adversary Proceeding, Claim No. 447 or Claim No. 1723.

11. **Expenses.** The Parties shall bear their own costs, expenses and attorneys' fees incurred in connection with the Trust Released Claims, the PNY Released Claims, the Adversary Proceeding, and this Settlement Agreement. In the event of any dispute in connection with the enforcement of this Settlement Agreement, the prevailing Party shall be entitled to its reasonable attorneys' fees, costs and all necessary disbursements and out-of-pocket expenses, whether statutorily approved or non-approved costs, incurred in connection with such action or proceeding, as determined by this Court.

12. **No Other Obligations.** The Parties agree that the Parties have no obligation to one another other than as set forth herein.

13. **Severability.** The Parties agree that if any provision of this Settlement Agreement is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable, that provision shall not be a part of this Settlement Agreement. The legality, validity and enforceability of the remaining provisions shall not be affected by a provision of this Settlement Agreement that is illegal, invalid or unenforceable.

14. **Confidentiality.** This Settlement Agreement is confidential and neither the Settlement Agreement nor the terms of the Settlement Agreement shall be

disclosed to any person, except for (a) the Parties and/or (b) any attorneys, professionals, and/or agents of the Parties, without the consent and agreement in writing of the Parties. Notwithstanding the foregoing, it shall not be considered a breach of this paragraph for a Party to disclose the terms hereof to local, state, and federal tax authorities, the Parties' auditors or accountants, or to make such disclosure to any other persons or entities when legally compelled to do so or in connection with litigation arising from or related hereto.

15. Miscellaneous.

(a) Nothing contained herein shall be deemed an admission of liability on the part of the Trust or PNY.

(b) Neither this Settlement Agreement, nor any statement made or action taken in connection with the negotiation of this Settlement Agreement, shall be offered or received in evidence or in any way referred to in any legal action or administrative proceeding among or between the parties hereto, other than as may be necessary (i) to obtain approval of and to enforce this Settlement Agreement (including the mutual releases contained herein) or (ii) to seek damages or injunctive relief in connection therewith.

(c) Each of the parties hereto shall execute and deliver any and all additional papers, documents and other assurances, and shall do any and all acts and things reasonably necessary or appropriate in conjunction with the performance of their respective obligations hereunder.

(d) No provision of this Settlement Agreement is intended to confer any rights, benefits, remedies, obligations or liabilities hereunder upon any person other than the Parties hereto and their respective successors.

(e) This Settlement Agreement shall be governed by and construed in accordance with the law of the Commonwealth of Virginia without regard to any choice of law provisions.

(f) This Settlement Agreement may be signed in counterpart originals and delivered by facsimile or email, which, when fully executed, shall constitute a single original.

(g) The United States Bankruptcy Court for the Eastern District of Virginia shall retain exclusive jurisdiction (and the parties consent to such retention of jurisdiction) with respect to any disputes arising from or related to, or other actions to interpret, administer or enforce the terms and provisions of, this Settlement Agreement.

(h) Each person or entity who executes this Settlement Agreement on behalf of another person or entity represents and warrants that he, she, or it is duly authorized to execute this Settlement Agreement on behalf of such person or entity, has the requisite authority to bind such person or entity, and such person or entity has full knowledge of and has consented to this Settlement Agreement. The representations and warranties set forth in this paragraph shall survive execution of this Settlement Agreement.

(i) This Settlement Agreement is effective upon the Effective Date (as defined below).

(j) This Settlement Agreement shall not be modified, altered, amended or vacated without the written consent of all parties hereto or order of the Bankruptcy Court.

(k) This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto, including any Chapter 7 trustee or the Liquidating Trustee under the Plan.

16. The "Effective Date" of this Agreement and all of its terms shall be the later of (i) execution by all Parties and (ii) the expiration of the applicable Notice Period, if any, under the Liquidating Trust Agreement.

IN WITNESS WHEREOF, this Agreement is hereby executed as of February
January 7

2, 2011.

ACCEPTED AND AGREED TO BY:

THE CIRCUIT CITY STORES, INC.
LIQUIDATING TRUST

By: [Signature]

TAVENNER & BERAN, P.L.C.
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Paula S. Beran (VA Bar No. 34679)
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- and -

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(310) 277-6910

Counsel to the Circuit City
Stores, Inc. Liquidating Trust

Dated: January 31, 2011

PNY TECHNOLOGIES, INC.

By: [Signature]

Its Treasurer

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 Andrew W. Caine, Esq.
 (admitted *pro hac vice*)
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Counsel to the Liquidating Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE EASTERN DISTRICT OF VIRGINIA
 RICHMOND DIVISION**

In re:) Case No. 08-35653 (KRH)
)
CIRCUIT CITY STORES, INC., <u>et al.</u> ,) Chapter 11
)
Debtors.) (Jointly Administered)
)
ALFRED H. SIEGEL, AS TRUSTEE OF THE)
CIRCUIT CITY STORES, INC. LIQUIDATING) Adv. Pro. No. 10-03056
TRUST,)
)
Plaintiff,)
)
v.)
)
PNY TECHNOLOGIES, INC.,)
Defendant.)



STIPULATION OF VOLUNTARY DISMISSAL

Comes now Alfred H. Siegel, the duly appointed trustee of the Circuit City Stores, Inc. Liquidating Trust (the "Trustee"), pursuant to the Second Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors in Possession and its

Official Committee of Creditors Holding General Unsecured Claims (the "Plan"), by counsel, and pursuant to Bankruptcy Procedure Rule 7041 and Federal Rule of Civil Procedure 41, moves to dismiss with prejudice the complaint against PNY Technologies, Inc. ("PNY"). As a point of clarification, and as memorialized in the parties' settlement agreement, this requested dismissal is without prejudice to the Trustee's rights, all of which are expressly reserved, to object to the validity and extent of PNY's Claim No. 1723, which claim is addressed in the complaint (as the Litigation Claim) in this adversary proceeding based solely on other grounds for objection. As evidenced by the endorsement herein, PNY consents to the dismissal provided for herein.

Dated: Richmond, Virginia
Feb. 14, 2011

TAVENNER & BERAN, PLC

/s/ Paula S. Beran

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Counsel to Plaintiff
Alfred H. Siegel, Trustee of the Circuit City Stores,
Inc. Liquidating Trust

Seen and Agreed:

McCARTER & ENGLISH, LLP

By: 

Michael Reynolds, Esq.

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Counsel to PNY Technologies, Inc.